No. 01-896 (17)

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY AND
CITIBANK (SOUTH DAKOTA), N.A.,

Petitioners,

v.

JOHN B. MCCAULEY *et al.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED DECEMBER 19, 2001
CERTIORARI GRANTED FEBRUARY 19, 2002

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APPENDIX A

U.S. District Court -- Western Washington (Seattle)
CIVIL DOCKET FOR CASE #: 98-MD-1199
In re: Ford Motor Co/Citibk

[Caption matter omitted]
[Docket as of December 5, 2001 3:13 am]

1/9/98	1	ORDER from Multidistrict Litigation Judicial Panel re: Transfer Order to the Western District of Washington at Seattle and assigned to Judge William L. Dwyer. Our MDL Case No. is MDL 1199. LIST OF CASES FROM OTHER COURTS AS FOLLOWS: 1. Northern Dist. of Illinois-Eastern Division - 97-cv-5627, John B. McCauley vs. Ford Motor et al (Our Case No. Assigned is C98-151WD); 2. Eastern Distroct of New York (Brooklyn) - 97-cv-4648, Essig et al vs. Ford Motor (Our Case No. Assigned is C98-152WD); 3. District of Oregon - 97cv1186, Merrick vs. Ford Motor Co et al (Our Case No. Assigned is C98-153WD); 4. Central District of CA (Western Division) - 97-cv-9198 La Grou vs. Ford Motor Co et al (Our Case No. Assigned is C98-226WD); 5. Our Case - Western District of WA at Seattle - C97-1293WD. (cc: counsel, Judge, MDL) (md) [Entry date 03/31/98] [Edit date 03/31/98]
1/9/98	--	ENT- Reference must be made to the individual docket sheet for entries relating only to individual actions. (md) [Entry date 03/31/98]

4/1/98	2	LETTER, to the individual courts that will be transferring cases to the Western Dist of Wa at Seattle re MDL 1199, In Re: Ford Motor Company/Citibank NA Cardholder Rebate Program Litigation. Attached is a certified copy of the Order from the MDL Panel w/a list of cases and our case numbers. (md)
4/1/98	3	LETTER from Deputy Clerk, dated 4/1/98 to all cnsl of record re: General Court Rules as to MDL and individual cases and Western Dist of Wa Local Rules. (md)
4/9/98	4	LETTER from Thomas Boeder, dated 4/8/98 re: Thomas Boeder and Margaret McKeown are partners at Perkins Coie (Docket reflects Correct address per letter head.) (md) [Entry date 04/13/98]
6/4/98	5	MOTION by plaintiffs' for order/entry of pretrial order no. 1 (md) [Entry date 06/05/98]
6/4/98	6	MEMORANDUM by plaintiff in support of motion for order/entry of pretrial order no. 1 [5-1] (md) [Entry date 06/05/98]
6/4/98	--	LODGED ORDER: re: motion for order/entry of pretrial order no. 1 [5-1] (md) [Entry date 06/05/98]
6/4/98	7	AFFIDAVIT OF SERVICE by plaintiff of motion for order/entry of pretrial order no. 1 [5-1] (md) [Entry date 06/05/98]
6/12/98	11	ORDER (certified) from MDL Panel adding Ricky A. Copeland vs. Ford Motor Co, Northern Dist of Alabama, Case No. 7:97-2666. to MDL-1199. (notified all cnsl of record and MDL with a copy of letter/docket sheet) (cc: counsel, Judge, MDL Panel) (md) [Entry date 06/18/98]

6/15/98	8	RESPONSE by defendant to Pltf's motion for entry of Pretrial Order No. 1 [0-0] (md) [Entry date 06/16/98]
6/15/98	--	LODGED ORDER: re: consideration of Pretrial Order No. 1 [8-1] (md) [Entry date 06/16/98]
6/15/98	9	AFFIDAVIT OF SERVICE by defendant of motion response [8-1] (md) [Entry date 06/16/98]
6/15/98	10	MEMORANDUM by plaintiff Jeffrey Scott Merrick in response to pltfs' motion for entry of Pretrial Order No. 1 (md) [Entry date 06/16/98]
6/18/98	--	REPLY by plaintiff in support of motion for entry of pretrial order no. 1 [0-0] (md) [Entry date 06/19/98]
6/18/98	13	REPLY by plaintiff in support of motion for entry of pretrial Order No. 1 [0-0] (md) [Entry date 06/19/98]
6/18/98	--	LODGED ORDER: re: proposed amended pretrial order no. 1 [13-1] (md) [Entry date 06/19/98]
6/18/98	14	AFFIDAVIT OF SERVICE by plaintiff of reply [13-1] (md) [Entry date 06/19/98]
6/22/98	15	ORDER by Judge William L. Dwyer DENYING pltf's motion for order/entry of pretrial order no. 1 [5-1]. Ordered that cnsl for all parties shall meet and confer on or before 7/6/98 to negotiate the terms of a case management order to govern this consolidated litigation; the parties shall submit a stipulated case management order on or before 7/9/98 covering all matters as to which the parties have reached. Pltf's motion for entry of

		pretrial order no. 1 is denied without prejudice. (cc: counsel, Judge) (md)
6/27/98	16	LETTER by defendant Citibank (SD) NA re: removing attorney Margaret McKeown who is now a judge on the Ninth Circuit Court of Appeals. (md) [Entry date 06/29/98]
7/16/98	--	LODGED ORDER: case management order (rs) [Entry date 07/17/98]
7/22/98	17	CASE MANAGEMENT ORDER by Judge William L. Dwyer (cc: counsel, Judge) (rs)
8/5/98	18	COMPLAINT (consolidated) (md) [Entry date 08/10/98]
8/5/98	19	AFFIDAVIT OF SERVICE by plaintiff of consolidated complaint [18-1] (md) [Entry date 08/10/98]
9/8/98	20	MOTION by defendants to dismiss all claims for failure to state a claim (md) [Entry date 09/09/98]
9/8/98	--	PROPOSED memorandum in support of re: motion to dismiss all claims for failure to state a claim [20-1] (md) [Entry date 09/09/98]
9/8/98	--	LODGED ORDER: re: motion to dismiss all claims for failure to state a claim [20-1] (md) [Entry date 09/09/98]
9/8/98	21	MOTION by defendants' for leave to file an overlength brief in support of motion to dismiss (md) [Entry date 09/09/98]
9/8/98	22	MEMORANDUM by defendant in support of motion for leave to file an overlength brief in support of motion to dismiss [21-1] (md) [Entry date 09/09/98]

9/8/98	--	LODGED ORDER: re: motion for leave to file an overlength brief in support of motion to dismiss [21-1] (md) [Entry date 09/09/98]
9/8/98	23	AFFIDAVIT OF SERVICE by defendant of motion for leave to file an overlength brief in support of motion to dismiss [21-1] (md) [Entry date 09/09/98]
9/9/98	24	RESPONSE by plaintiff to motion for leave to file an overlength brief in support of motion to dismiss [21-1] (md) [Entry date 09/10/98]
9/9/98	25	AFFIDAVIT OF SERVICE by plaintiff of motion response [24-1] (md) [Entry date 09/10/98]
9/14/98	26	ORDER by Judge William L. Dwyer GRANTING defts' motion for leave to file an overlength brief in support of motion to dismiss [21-1] (cc: counsel, Judge) (md)
9/14/98	27	MEMORANDUM by defendant in support of motion to dismiss all claims for failure to state a claim [20-1] (md)
9/18/98	28	NOTICE from attorney Monika Vasil that the following is RE-NOTED FOR 10/30/98 motion to dismiss all claims for failure to state a claim. Pltfs' response due 10/8/98 and reply due 10/23/98. (md)
10/8/98	29	MEMORANDUM by plaintiff in opposition to motion to dismiss all claims for failure to state a claim [20-1] Oral Argument Requested (md) [Entry date 10/09/98]
10/8/98	30	DECLARATION of Erin K. Flory re: memorandum [29-1] (md) [Entry date 10/09/98]

10/8/98 31 DECLARATION of John McCauley re: memorandum [29-1] (md) [Entry date 10/09/98]

10/8/98 32 DECLARATION of Howard Hornreich re: memorandum [29-1] (md) [Entry date 10/09/98]

10/8/98 33 DECLARATION of Lynette Hornreich re: memorandum [29-1] (md) [Entry date 10/09/98]

10/8/98 34 AFFIDAVIT of Thomas Walters re: memorandum [29-1] (md) [Entry date 10/09/98]

10/8/98 35 AFFIDAVIT of Gerald Essig re: memorandum [29-1] (md) [Entry date 10/09/98]

10/8/98 36 APPENDIX/WORKING PAPAERS filed by plaintiff re: memorandum [29-1] (md) [Entry date 10/09/98]

10/8/98 37 AFFIDAVIT OF SERVICE by plaintiff of memorandum [29-1] (md) [Entry date 10/09/98]

10/9/98 38 PRAECIPE: by plaintiffs to replace page 4 of the memorandum in opposition to defts' motion to dismiss [29-1] (md) [Entry date 10/13/98]

10/9/98 39 AFFIDAVIT OF SERVICE by plaintiff of praecipe [38-1] (md) [Entry date 10/13/98]

10/22/98 40 MINUTE ORDER: by Judge William L. Dwyer ; Brief status report ddl set for 10/30/98 (cc: counsel, Judge) (md)

10/23/98 41 REPLY memorandum by defendant Ford Motor Company, defendant Citibank in support of motion to dismiss claims for failure

to state a claim [20-1] (md) [Entry date 10/26/98]

10/23/98 42 AFFIDAVIT OF SERVICE by defendant of reply [41-1] (md) [Entry date 10/26/98]

10/30/98 43 JOINT STATUS REPORT filed by all parties. (md) [Entry date 11/02/98]

10/30/98 44 AFFIDAVIT OF SERVICE by plaintiff of joint status report [43-1] (md) [Entry date 11/02/98]

11/24/98 45 ORDER by Judge William L. Dwyer DENYING defts' motion to dismiss all claims for failure to state a claim [20-1] (cc: counsel, Judge) (md)

12/14/98 46 ANSWER to consolidated complaint [18-1] by defendant Ford Motor Company, jury demand (md) [Entry date 12/15/98]

12/14/98 47 AFFIDAVIT OF SERVICE by defendant Ford Motor Company of answer [46-1] (md) [Entry date 12/15/98]

12/14/98 48 ANSWER to complaint [18-1] by defendant Citibank (SD) NA (md) [Entry date 12/15/98]

12/14/98 49 AFFIDAVIT OF SERVICE by defendant Citibank (SD) NA of answer [48-1] (md) [Entry date 12/15/98]

1/11/99 -- LODGED ORDER: Confidentiality order (md) [Entry date 01/12/99]

1/12/99 50 PROTECTIVE ORDER/CONFIDENTIALITY ORDER by Judge William L. Dwyer : (cc: counsel, Judge) (md)

1/22/99	51	MINUTE ORDER: by Judge William L. Dwyer scheduling conference/hrg set for 2:00 2/4/99 (cc: counsel, Judge, Eileen) (md)
1/23/99	53	LETTER by plaintiff Ricky A Copeland re: correction of cnsl of record (md) [Entry date 01/27/99]
1/25/99	52	STIPULATION and ORDER by Judge William L. Dwyer, deadline for responses to discovery requests currently outstanding is extended to 2/8/99. Deadline for all class certification discovery is extended to 3/10/99. Other deadlines shall cont to be governed by the Cse management order, as amended by the forgoing. (cc: counsel, Judge, Eileen) (md) [Entry date 01/26/99]
2/4/99	54	MINUTE ORDER: by Judge William L. Dwyer, in view of the procedural and scheduling orders applicable to all of these cases, the case specific scheduling order entered on 9/30/97 in Hornreich vs. Ford Motor is vacated (cc: counsel, Judge) (md) [Entry date 02/05/99]
2/4/99	55	MINUTE ORDER: by Judge William L. Dwyer, in view of the stipulated order establishing certain dates entered on 1/25/99, a scheduling conference is not necessary at this point, and the conference previously scheduled on 2/4/99 is canceled. Cnsl have been notified by this by telephone and have concurred (cc: counsel, Judge) (md) [Entry date 02/05/99]
2/4/99	--	MAIL RETURNED: re: order [50-1] addressed to Alfred M. Swanson (md) [Entry date 02/05/99]

3/4/99	--	MAIL RETURNED: re: stipulation [52-2] addressed to Alfred M. Swanson Jr (md) [Entry date 03/05/99]
3/10/99	56	STIPULATION/MOTION to extend discovery (md) [Entry date 03/11/99]
3/10/99	--	LODGED ORDER: re: stipulation [56-1] (md) [Entry date 03/11/99]
3/10/99	57	AFFIDAVIT OF SERVICE by In re of stipulation to extend discovery [56-1] (md) [Entry date 03/11/99]
3/11/99	58	STIPULATION and ORDER by Judge William L. Dwyer ; class certification discovery ddl extended to 4/6/99 (cc: counsel, Judge) (md)
4/9/99	59	MOTION by plaintiff to certify class action NOTED FOR 5/28/99 (md) [Entry date 04/12/99]
4/9/99	60	MEMORANDUM by plaintiff in support of motion to certify class action [59-1] (under seal) (md) [Entry date 04/12/99]
4/9/99	61	DECLARATION of Steve W. Berman re motion to certify class action [59-1] (md) [Entry date 04/12/99]
4/9/99	62	EXHIBITS/CONPENDIUM OF DEFTS INTERNAL DOCUMENTS designated as confidential in support of pltfs' memorandum [60-1] (under seal) (md) [Entry date 04/12/99]
4/9/99	--	LODGED ORDER: re: motion to certify class action [59-1] (md) [Entry date 04/12/99]
4/9/99	63	AFFIDAVIT OF SERVICE by plaintiff of motion to certify class action [59-1] (md) [Entry date 04/12/99]

4/30/99	--	LODGED ORDER: stipulation and order re: 30 day extension fur submission of defts' opposition to pltfs' motion for class certification. (md) [Entry date 05/04/99]
4/30/99	64	AFFIDAVIT OF SERVICE re: stipulation and order (md) [Entry date 05/04/99]
5/5/99	65	STIPULATION and ORDER by Judge William L. Dwyer : that defts will file brief in opposition to class certification. RE-NOTED FOR 6/11/99 motion to certify class action [59-1] (cc: counsel, Judge) (md)
5/11/99	66	MINUTE ORDER: by Judge William L. Dwyer RE- NOTED FOR 6/18/99 motion to certify class action. Any reply will be due on 6/17/99 [59-1] (cc: counsel, Judge) (md) [Entry date 05/12/99]
6/7/99	--	LODGED ORDER: stipulation and order to extend for submission of defts opposition to pltfs' motion for class certification (md) [Entry date 06/08/99]
6/7/99	67	AFFIDAVIT OF SERVICE by defendant of order lodged [0-0] (md) [Entry date 06/08/99]
6/8/99	68	STIPULATION and ORDER by Judge William L. Dwyer, defts will file their brief in opposition to class certification on 6/9/99 (cc: counsel, Judge) (md)
6/9/99	69	MOTION by defendant Citibank for leave to file overlength brief in opposition to pltfs' motion for class certification (md) [Entry date 06/10/99] [Edit date 06/10/99]
6/9/99	70	MEMORANDUM by defendant Citibank in support of motion for leave to file overlength brief in opposition to pltfs' motion for class

certification [69-1] (md) [Entry date 06/10/99] [Edit date 06/10/99]

6/9/99	--	LODGED ORDER: re: motion for leave to file overlength brief in opposition to pltfs' motion for class certification [69-1] (md) [Entry date 06/10/99] [Edit date 06/10/99]
6/9/99	--	PROPOSED defts opposition to pltfs' motion for class certification (under seal) re: motion for leave to file overlength brief in opposition to pltfs' motion for class certification [69-1] (md) [Entry date 06/10/99]
6/10/99	71	ORDER by Judge William L. Dwyer GRANTING defts' motion for leave to file overlength brief in opposition to pltfs' motion for class certification [69-1] (cc: counsel, Judge) (md) [Entry date 06/11/99]
6/10/99	72	MEMORANDUM by defendant Ford Motor Company, defendant Citibank in opposition to motion to certify class action [59-1] (under seal) (md) [Entry date 06/11/99]
6/10/99	73	DECLARATION of Michael D. Pratt and expert report and exhibits re: memorandum [72-1] (md) [Entry date 06/11/99]
6/10/99	74	APPENDIX Volm I filed by defendant re: memorandum [72-1] (under seal) (md) [Entry date 06/11/99]
6/10/99	75	APPENDIX Volm II filed by defendant re: memorandum [72-1] (md) [Entry date 06/11/99]
6/10/99	76	DECLARATION of Sheryl Behar re: memorandum [72-1] (under seal) (md) [Entry date 06/11/99]

6/10/99	77	DECLARATION of Marshall G. Greenberg re: memorandum [72-1] (under seal) (md) [Entry date 06/11/99]
6/10/99	78	DECLARATION of Joel B. Cohen re: memorandum [72-1] (under seal) (md) [Entry date 06/11/99]
6/10/99	--	LODGED ORDER: re: order denying pltfs' motion for class certification [72-1] (md) [Entry date 06/11/99]
6/10/99	79	AFFIDAVIT OF SERVICE by defendant of memorandum [72-1] (md) [Entry date 06/11/99]
6/17/99	--	LODGED ORDER: stipulation and order for extension of time to file reply brief (md) [Entry date 06/18/99]
6/17/99	80	AFFIDAVIT OF SERVICE by In re of order lodged [0-0] (md) [Entry date 06/18/99]
6/18/99	81	STIPULATION and ORDER by Judge William L. Dwyer for an 11 day extension for filing of pltfs' reply brief in support of class certification. (cc: counsel, Judge) (md)
6/18/99	82	MINUTE ORDER: by Judge William L. Dwyer RE- NOTED FOR 7/2/99 motion to certify class action [59-1] (cc: counsel, Judge) (md)
6/22/99	--	MAIL RETURNED: re: order [71-1] addressed to Michael J. Rosenfeld (md) [Entry date 06/23/99]
6/25/99	--	MAIL RETURNED: re: stipulation [68-1] addressed to Alfred M. Swanson Jr (md) [Entry date 06/28/99]

6/28/99	83	MOTION by In re pltfs' for leave to file overlength reply brief NOTED FOR 7/16/99 (md) [Entry date 06/29/99]
6/28/99	84	MOTION by plaintiffs' to shorten time on [84-1] motion for leave to file overlength reply brief [83-1] NOTED FOR 6/29/99 (md) [Entry date 06/29/99]
6/28/99	--	LODGED ORDER: re: motion to shorten time on motion for leave to file overlength reply brief [83-1] [84-1] (md) [Entry date 06/29/99]
6/28/99	--	LODGED ORDER: re:amended order granting pltfs' motion to certify class action [59-1] (md) [Entry date 06/29/99]
6/28/99	--	PROPOSED pltfs' reply memo re: motion for leave to file overlength reply brief [83-1] (md) [Entry date 06/29/99]
6/28/99	85	AFFIDAVIT OF SERVICE by plaintiff of motion for leave to file overlength reply brief [83-1] (md) [Entry date 06/29/99]
6/30/99	86	ORDER by Judge William L. Dwyer GRANTING pltfs' motion to shorten time on motion for leave to file overlength reply brief [83-1] [84-1]; GRANTING pltfs' motion for leave to file overlength reply brief [83-1] (cc: counsel, Judge) (md)
6/30/99	87	REPLY memorandum by plaintiff in support of class certification (under seal) [59-1] (md)
6/30/99	88	APPENDIX/working papers filed by plaintiff in support of reply [87-1] (not under seal) (md)
7/2/99	89	MOTION by defendant for leave to file opposition to pltfs' amended motion for class

certification NOTED FOR 7/23/99 (md) [Entry date 07/06/99]

7/2/99 90 MEMORANDUM by defendant in support of motion for leave to file opposition to pltfs' amended motion for class certification [89-1] (md) [Entry date 07/06/99]

7/2/99 -- LODGED ORDER: re: motion for leave to file opposition to pltfs' amended motion for class certification [89-1] (md) [Entry date 07/06/99]

7/2/99 91 MOTION by defendant to shorten time on [91-1] motion for leave to file opposition to pltfs' amended motion for class certification [89-1] NOTED FOR 7/7/99 (md) [Entry date 07/06/99]

7/2/99 92 MEMORANDUM by defendant in support of motion to shorten time on motion for leave to file opposition to pltfs' amended motion for class certification [89-1] [91-1] (md) [Entry date 07/06/99]

7/2/99 -- LODGED ORDER: re: motion to shorten time on motion for leave to file opposition to pltfs' amended motion for class certification [89-1] [91-1] (md) [Entry date 07/06/99]

7/2/99 93 AFFIDAVIT OF SERVICE by defendant of motion for leave to file opposition to pltfs' amended motion for class certification [89-1] et al (md) [Entry date 07/06/99]

7/7/99 94 ORDER by Judge William L. Dwyer GRANTING motion to shorten time on motion for leave to file opposition to pltfs' amended motion for class certification [89-1] [91-1]; RE- NOTED FOR 7/9/99 motion for leave to file opposition to pltfs' amended

motion for class certification [89-1] (C to counsel, Judge) (md) [Entry date 07/08/99]

7/9/99 95 MEMORANDUM by plaintiff in opposition to motion for leave to file opposition to pltfs' amended motion for class certification [89-1] (md) [Entry date 07/12/99]

7/9/99 96 AFFIDAVIT OF SERVICE by plaintiff of memorandum [95-1] (md) [Entry date 07/12/99]

7/14/99 97 MINUTE ORDER: by Judge William L. Dwyer DENYING dfts' motion for leave to file opposition to pltfs' amended motion for class certification [89-1]. Oral argument on the motion for class certification set for 7/29/99 at 9:00 (cc: counsel, Judge) (rs) [Entry date 07/15/99]

7/19/99 98 MINUTE ORDER: by Judge William L. Dwyer renoting the motion to certify class action [59-1] for 7/29/99 (cc: counsel, Judge) (rs) [Entry date 07/21/99]

7/24/99 102 MAIL RETURNED: re: order [86-1] addressed to Alfred Swanson (rs) [Entry date 07/30/99]

7/27/99 99 MINUTE ORDER: by Judge William L. Dwyer rescheduling oral argument on the motion for class certification from 9am to 10am on 7/29/99 (cc: counsel, Judge, ES) (rs) [Entry date 07/28/99]

7/29/99 100 ORDER RESCHEDULING CLASS CERTIFICATION MOTION by Judge William L. Dwyer: pltfs may file suppl brief on 9/9/99 and dfts may file suppl brief on 9/23/99 re motion to certify. The motion to

certify class action [59-1] is renoted for 9/24/99 (cc: counsel, Judge) (rs)

7/29/99 101 TRANSCRIPT FILED of hearing on motion for class certification on 7/29/99 CR: Sue Palmerton (rs) [Entry date 07/30/99]

7/29/99 103 MAIL RETURNED: re: order [94-1] addressed to Alfred Swanson (rs) [Entry date 07/30/99]

7/29/99 104 MINUTES: WLD; Dep Clerk: Eileen; CR: Susan Palmerton; Pla Counsel Steve Berman; Def Counsel Sidney Snyder etal. Oral argument held on 7/29/99 re: additional discovery on motion to certify class. RE-NOTED FOR 9/24/99 motion to certify class action [59-1] (md) [Entry date 08/02/99]

7/30/99 -- MAIL RETURNED: re: Minute Order addressed to Alfred M. Swanson, Jr [97-2] (md) [Entry date 08/02/99]

8/7/99 -- MAIL RETURNED: re: Minute Order [98-1] addressed to Alfred Swanson (md) [Entry date 08/10/99]

8/13/99 -- MAIL RETURNED: re: Minute Order [99-2] addressed to Alfred M. Swanson Jr (md) [Entry date 08/16/99]

8/14/99 -- MAIL RETURNED: re: order [100-1] addressed to Alfred Swanson, Jr (md) [Entry date 08/17/99]

8/23/99 -- LODGED ORDER: stipulation and order for a 10 day extension for pltf to take additional discovery (md) [Entry date 08/24/99]

8/23/99 105 AFFIDAVIT OF SERVICE by plaintiff of order lodged [0-0] (md) [Entry date 08/24/99]

8/24/99 106 STIPULATION and ORDER by Judge William L. Dwyer : RE- NOTED FOR 10/5/99 motion to certify class action [59-1] Pltf will file their supplemental brief on 9/20/99 and defts will file their supplemental brief on 10/5/99 (cc: counsel, Judge) (md) [Entry date 08/25/99]

9/7/99 -- MAIL RETURNED: re: stipulation [106-1] addressed to Michael Rosenfeld (md) [Entry date 09/08/99]

9/7/99 -- MAIL RETURNED: re: stipulation [106-1] addressed to Alfred M. Swanson (md) [Entry date 09/08/99]

9/20/99 107 SUPPLEMENT MEMORANDUM by In re, plaintiffs re motion to certify class action [59-1] (under seal) (md) [Entry date 09/21/99]

9/20/99 108 DECLARATION (supplemental) of Jeniphr Breckenridge re: supplemental memorandum [107-1] (under seal) (md) [Entry date 09/21/99]

9/20/99 -- LODGED ORDER: re: proposed second amended order granting pltfs' motion to certify class [107-1] (md) [Entry date 09/21/99]

9/20/99 109 AFFIDAVIT OF SERVICE by In re, plaintiff of supplemental [107-1] (md) [Entry date 09/21/99]

9/21/99 110 PRAECIPE: by plaintiff re: exhibits to be attached to re: declaration of Jeniphr Breckenridge [108-1] (md) [Entry date 09/22/99]

9/21/99 111 AFFIDAVIT OF SERVICE by plaintiff of praecipe [110-1] (md) [Entry date 09/22/99]

10/4/99 -- LODGED ORDER: stipulation and order to file response to pltfs' supplemental memo in suport of class certification. (md) [Entry date 10/05/99]

10/5/99 112 STIPULATION and ORDER by Judge William L. Dwyer for a 3 day extension for submission of defts' response to pltfs' supplemental memorandum in support of class certification. : (cc: counsel, Judge) (md)

10/7/99 113 MEMORANDUM (supplemental) by defendant in opposition to motion to certify class action [59-1](w/attachments) (md) [Entry date 10/08/99]

10/7/99 114 AFFIDAVIT OF SERVICE by defendant of memorandum [113-1] (md) [Entry date 10/08/99]

10/14/99 115 ORDER TO SHOW CAUSE: by Judge William L. Dwyer deadline set for 10/21/99 for parties to show cause in writing why the following cases should not be dismissed for lack of jurisdiction or remanded to state court: C98-817WD; C98-152WD; C97-1293WD; C98-226WD; C98-151WD and C98-153WD (cc: counsel, Judge) (rs)

10/21/99 116 MAIL RETURNED: re: stipulation [112-1] addressed to James Rennerty (md) [Entry date 10/22/99]

10/21/99 117 RESPONSE by plaintiff re: calendar motion order to show cause [0-0] (md) [Entry date 10/22/99]

10/21/99 118 AFFIDAVIT OF SERVICE by plaintiff of response [117-1] (md) [Entry date 10/22/99]

10/21/99 119 MEMORANDUM by defendant Ford Motor Company re calendar motion order to show cause [0-0] (md) [Entry date 10/22/99]

10/21/99 120 AFFIDAVIT OF SERVICE by defendant Ford Motor Company of memorandum [119-1] (md) [Entry date 10/22/99]

10/23/99 121 MAIL RETURNED: re: stipulation [112-1] addressed to Michael Rosenfeld (md) [Entry date 10/26/99]

10/26/99 122 MAIL RETURNED: re: stipulation [112-1] addressed to Alfred M. Swanson, Jr (md) [Entry date 10/27/99]

10/29/99 123 ORDER by Judge William L. Dwyer of dismissal and remand to State Court as to civil cases C98-817WD; C98-152WD; C97-1293WD; C98-226WD; C98-151WD; C98-153WD. The Court therefore lacks subject matter jurisdiction over the consolidated complaint and the six removed cased. (cc: counsel, Judge) (md) [Entry date 11/01/99]

11/4/99 124 NOTICE OF APPEAL (99-36115) by In re Ford Motor Company from Dist. Court decision [123-1] (cc: CCA, WLD, counsel) (lb) [Entry date 11/09/99] [Edit date 12/06/99]

11/4/99 -- APPEAL FEE RECEIVED: Appellant Ford Motor Company paid fee in amount of $ 105.00 (Receipt 263033) (lb) [Entry date 11/09/99]

11/4/99 125 CERTIFICATE of SERVICE by Ford Motor Company of Notice of Appeal; Representation Statement; Civil Appeals Docketing Statement and Certificate of Service. (lb) [Entry date 11/09/99]

11/9/99 -- APPEAL NOTIFICATION packet sent to CCA (cc: cnsl) (lb)

11/9/99 -- ENT-Civil Appeals Docketing Statement forwarded to Mediator's Office in Seattle. (lb)

11/9/99 -- ENT-Representation Statement forwarded to 9th CCA. (lb)

11/22/99 126 MAIL RETURNED: re:. order [123-1] addressed to Alfred M. Swanson Jr (md) [Entry date 11/29/99]

11/24/99 127 NOTICE OF APPEAL (99-36206) by defendant Citibank from Dist. Court decision [123-1] (cc: CCA, WLD, counsel) (lb) [Entry date 12/05/99] [Edit date 12/16/99]

11/24/99 -- APPEAL FEE RECEIVED: Appellant Citibank paid fee in amount of $ 105.00 (Receipt 263442) (lb) [Entry date 12/05/99]

11/24/99 -- NOTIFICATION by Circuit Court of Appellate Docket Number 99-36115 (Ford) (lb) [Entry date 12/06/99]

11/29/99 -- ENT-Representation Statement from Citibank forwarded to 9th CCA. (lb) [Entry date 12/08/99]

11/29/99 128 TRANSCRIPT DESIGNATION and Ordering Form for dates: None. (lb) [Entry date 12/08/99]

12/5/99 -- APPEAL NOTIFICATION packet sent to CCA (cc: cnsl) (lb)

12/15/99 -- NOTIFICATION by Circuit Court of Appellate Docket Number 99-36206 (Citibank) (lb) [Entry date 12/16/99]

12/20/99 129 MAIL RETURNED: re: appeal [127-1] addressed to Alfred Swanson. (lb)

12/27/99 130 ORDER (CCA 99-36115) A review of the record suggests that this court may lack jurisdiction over the appeal because an order remanding an action to state pursuant to 28 USC 1447(c) due to lack of subject matter jurisdiction is not reviewable under 28 USC 1291. Withinn 14 days after entry of this order, appellant shall move for voluntary dismissal of the appeal or show cause why is should not be dismissed for lack of jurisdiction. If appellant elects to show cause, appellee's may respond within 10 days after service of appellant's memorandum. If appellant does not comply with this order, the Clerk shall dismiss this appeal pursuant to 9th CCA rule 42-1. Briefing is suspended pending further order of the court. (lb) [Entry date 01/04/00]

12/29/99 -- CERTIFICATE OF RECORD Transmitted to USCA, (cc: all counsel) (jk)

1/12/00 131 TRANSCRIPT DESIGNATION and Ordering Form for dates: None [127-1] (lb) [Entry date 01/13/00]

1/12/00 132 CERTIFICATE of SERVICE by defendant Citibank of Transcript Order and Certificate of Service. (lb) [Entry date 01/13/00]

3/21/00 1983 ORDER (CCA 99-36115 & 99-36206) The parties' stipulated motion to consolidate these appeals is granted. Appeals nos. 99-36115 and 99-36206 are consolidated. The court has received and reviewed appellant's identical responses to this court's orders to show cause of 12/21/99 and 1/27/00. The jurisdictional issue does not appeal suitable for summary disposition. Accordingly, the order to show cause are discharged. The

opening brfs are due 4/18/2000; the answering brfs are due 5/18/2000; and the optional reply brfs are due 14 days after service of the answering brfs. The parties shall include brfs on the merits a discussion of the jurisdictional issue. All parties on a side are encouraged to join in a single brf to the greatest extent practicable. (lb) [Entry date 03/27/00]

11/7/01 1984 MANDATE (99-36115, 99-36206) from Circuit Court of Appeals AFFIRMING IN PART and DISMISSING IN PART the decision of the District Court [127-1],[124-1] (cc: all counsel, WLD, jgm book) (sa) [Entry date 11/08/01]

11/20/01 1985 MAIL RETURNED: re: rder appeal [1984-1] addressed to James . Fennerty, ESQ. (sa) [Entry date 11/21/0

11/28/01 1986 MAIL RETURNED: from Alfred M. Swanson, Jr. re: order appeal 984-1] (sa)

12/1/01 1987 MAIL RETURNED: re: order appeal, addressed to Frederick Kuykendall, III. [1984-1] (sa) [Entry date 12/04/01]

APPENDIX B

General Docket for the
US Court of Appeal for the Ninth Circuit

[Caption matter omitted]
[Docket as of March 7, 2002 11:15 pm]

99-36115 McCauley, et al v. Ford Motor Company, et al

11/22/99 DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): N. setting schedule as follows: appellant's designation of RT is due 11/15/99; appellee's designation of RT is due 11/24/99; appellant shall order transcript by 12/6/99; court reporter shall file transcript in DC by 1/4/00; certificate of record shall be filed by 1/11/00 ; appellant's opening brief is due 2/22/00; appellees' brief is due 3/21/00; appellants' reply brief is due w/in 14 days of svc of aple's brief. [99-36115] (jmk) [99-36115]

11/22/99 Filed attorney for Appellant Civil Appeals Docketing Statement served on 11/4/99 (to CONFATT) [99-36115] [99-36115] (jmk) [99-36115]

11/22/99 Filed notice of Representation of Steve Berman, John Alexander, Michael Rosenfeld, Roger Kirby, James Lewis, Michael Williams, Russell Drake for Aples. John Beisner, Brian Anderson, Brian Brooks, Sidney Snyder for Aplt Ford Motor Company. Christopher Lipsett, Bruce Berman, Natacha Steimer, Thomas Boeder for Aplt Citibank. [99-36115] (jmk) [99-36115]

11/30/99 Case rejected from Circuit Mediation Program. (sa) [99-35942 99-35943 99-36087 99-36095 99-36115]

12/1/99 Received Appellant Ford Motor Company's notice of non- designation of reporter's transcript. [99-36115] (cha) [99-36115]

12/21/99 Filed order MOATT (MF) A review of the record suggests that this court may lack jurisdiction over the appeal because an order remanding an action to state court pursuant to 28 U.S.C. 1447(c) due to lack of subject matter jurisdiction is not reviewable under 28 U.S.C. 1291. See 28 U.S.C. 1447(d); Krangel v. General Dynamics Corp., 968 F.2d 914, 915-16 (9th Cir. 1992)(per curiam). Within 14 days afater entry of this order, appellant shall move for voluntary dismissal of the appeal or show cause why it should not be dismissed for lack of jurisdiction. If appellant elects to show cause, appellees may respond within 10 days after service of appellant's memorandum. If appellant does not comply with this order, the clerk shall dismiss this appeal pursuant to Ninth Circuit Rule 42-1. Briefing is suspended pending further order of the court. [99-36115] (sm) [99-36115]

1/4/00 Filed Aplt Ford Motor Company's response to order to show cause; served on 1/3/00 (Moatt) [99-36115] (gva) [99-36115]

2/14/00 Filed Stipulated mtn by Aplt Citibank (S.D.), NA & aplt Ford Motor Company to consolidate cases 99-36115 & 99-36206 [99-36206, 99-36115] served on 2/11/00 [Response to MOATT OSC pening per PROMO) (Copies already sent via promo) [99-36206, 99-36115] (mhf) [99-36115 99-36206]

3/13/00 Filed order (Appellate Commissioner) The parties' stipulated motion to consolidate these appeals is GRANTED. Appeal nos. 99-36115 and 99-36206 are consolidated. The court has received and reviewed appellants' identical responses to this court's order to show cause of 12/21/99 and 01/27/00. The jurisdictional issue does not appear suitable for summary disposition. Accordingly, the orders to show cause are discharged. The following briefing schedule shall govern these consolidated appeals; the opening briefs are due 04/18/00; the answering briefs are due 05/18/00; and the optional reply briefs are due 14 days after service of the answering briefs. The parties shall include in the briefs on the merits a discussion of the jurisdictional issue. See National Indus. v. Republic Nat'l Life INs. Co., 677 F.2d 1258, 1262 (9th Cir. 1982).All parties on a side are encouraged to join in a single brief to the greatest extent practicable. See 9th Cir. R. 28-4. [3850164-1] in 99-36115, 99-36206 (MOATT) [99-36115, 99-36206] (sm) [99-36115 99-36206]

4/18/00 Received Appellant Ford Motor Company in 99-36115 and Appellant Citibank (S.D.), NA in 99-36206's formal brief in 33, 5 copies and 5 Excerpts of Record in 1 volume: deficient - only 5 copies submitted: notified counsel. Served on (cha) [99-36115 99-36206]

4/26/00 Received joint appellant's additional 10 briefs to satisfy (major) brief deficiency, served on 4/17/00 [99-36115, 99-36206] (cha) [99-36115 99-36206]

4/26/00 Filed original and 15 copies of joint appellant's formal opening brief in 34 pages and five excerpts of record in 1 volumes; served on 4/17/00 [99-36115, 99-36206] (cha) [99-36115 99-36206]

5/12/00 Rec'd notice of change of address from Jeffrey S. Love for Ford Motor Company in 99-36206 dated 5/10/00. (New address is: KLARQUIST, SPARKMAN, CAMPBELL, LEIGH & WHINSTON, One World Trade Ctr, 121 SW Salmon St, Ste 1600, Portland, OR 97204-2988, 503/226-7391 [99-36206, 99-36115] (mhf) [99-36115 99-36206]

5/18/00 Received orig. and 15 copies of Plaintiff-Appellees brief of 12 pages; 5 excerpts of record in 1 volume; deficient: No Certificate of Service; notified counsel [99-36115, 99-36206] (cha) [99-36115 99-36206]

5/26/00 Received Appellees Certificate of Service to satisfy (major) brief deficiency, served on 5/17/00. [99-36115, 99-36206] (cha) [99-36115 99-36206]

5/26/00 Filed original and 15 copies of appellees 12 page brief, 5 Exc. in 1 vol; served on 5/17/00 [99-36115, 99-36206] (cha) [99-36115 99-36206]

6/1/00 Filed original and 15 copies Ford Motor Company and Citibank (S.D.), NA's reply brief, (Informal: NO) 17 pages; served on 6/1/00 [99-36115, 99-36206] (sm) [99-36115 99-36206]

3/30/01 Calendar check performed [99-36115, 99-36206] (th) [99-36115 99-36206]

4/13/01 Calendar materials being prepared. [99-36115, 99-36206] [99-36115, 99-36206] (th) [99-36115 99-36206]

4/17/01 Filed order (Deputy Clerk: JF) These cases are being placed before the same panel for disposition because they may involve similar issues regarding the amount in controversy under diversity jurisdiction. The case are not consolidated for oral

argument. Counsel may wish to confer in order to enhance oral argument. The clerk shall serve a copy of the court's service list for each case on all parties. [99-36115, 99-36206, 00-35328] (gar) [00-35328 99-36115 99-36206]

4/19/01 CALENDARED: Seattle June 8 2001 9:00 a.m. Courtroom at Park Place, 21st Floor [99-36115, 99-36206] (th) [99-36115 99-36206]

5/8/01 Received Roger W. Kirby for Appellee Ricky A Copeland, Lynette M Hornreich, Howard S Hornreich, John LaGrou, Jeffrey Scott Merrick, Thomas Walters, Gerald Essig, John B McCauley letter dated 4/24/01 re: does not represent any party in these cases. [99-36115, 99-36206] (gar) [99-36115 99-36206]

6/8/01 ARGUED AND SUBMITTED TO James R. BROWNING, J. C. WALLACE, Thomas G. NELSON [99-36115, 99-36206] (ss) [99-36115 99-36206]

8/9/01 FILED CERTIFIED RECORD ON APPEAL IN 1 VOLS.(TOTAL): 1 CLERKS REC None RTs (Original) [99-36115] (kym) [99-36115]

9/6/01 FILED OPINION: AFFIRMED IN PART AND DISMISSED IN PART (Terminated on the Merits after Oral Hearing; Affirmed in Part and Dismissed in Part; Written, Signed, Published: James R. BROWNING; J. C. WALLACE, author; Thomas G. NELSON.) FILED AND ENTERED JUDGMENT. [99-36115, 99-36206] (gar) [99-36115 99-36206]

9/18/01 Filed Appellant Ford Motor Company, Appellant Citibank (S.D.), NA's unopposed motion to extend time to file petition for rehearing for another 7 days, [99-36115, 99-36206] served on

9/18/01. PANEL [4256286] [99-36115, 99-36206] (gar) [99-36115 99-36206]

9/25/01 Filed order (James R. BROWNING, J. C. WALLACE, Thomas G. NELSON,): granting appellant's unopposed motion to extend time to file a petition for rehearing [4256286-1] petition for rehearing due 9/27/01. [99-36115, 99-36206] (gar) [99-36115 99-36206]

9/27/01 [4263353] Filed original and 50 copies Appellant Ford Motor Company in 99-36115, Appellant Citibank (S.D.), NA in 99-36206 petition for rehearing with suggestion for rehearing en banc 13 p.pages, served on 9/27/01. PANEL AND ALL ACTIVE JUDGES [99-36115, 99-36206] (gar) [99-36115 99-36206]

10/9/01 Rec'd notice of change of address from Russell Jackson Drake for Appellee John B McCauley, Appellee Gerald Essig, Appellee Thomas Walters, Appellee Jeffrey Scott Merrick, Appellee John LaGrou, Appellee Howard S Hornreich, Appellee Lynette M Hornreich, Appellee Ricky A Copeland in 99-36115, Russell Jackson Drake for Appellee Ricky A Copeland in 99-36206 dated 10/3/01. [99-36115, 99-36206] (rc) [99-36115 99-36206]

10/22/01 Filed order (James R. BROWNING, J. C. WALLACE, Thomas G. NELSON,): denying petition for rehearing and petition for for enbanc rehearing [4263353-1] [99-36115, 99-36206] (gar) [99-36115 99-36206]

10/30/01 MANDATE ISSUED [99-36115, 99-36206] (gar) [99-36115 99-36206]

10/30/01 Filed Appellant Ford Motor Company and Citibank (S.D.), NA's motion to recall the

mandate. [99-36115, 99-36206] served on 10/30/01 PANEL [4287598] [99-36115, 99-36206] (gar) [99-36115 99-36206]

12/13/01 Filed order (James R. BROWNING, J. C. WALLACE, Thomas G. NELSON,): granting appellant's motion to recall mandate [4287598-1] Ford Motor Co. and Citibank may respond by letter-brief of no more than 5 pages, within 7 days of the date of this order, as to why it is necessary for this ct to withhold its mandate. [99-36115, 99-36206] (gar) [99-36115 99-36206]

12/19/01 Filed original and 15 copies Appellant Ford Motor Company in 99-36115, Appellant Citibank (S.D.), NA in 99-36206 supplemental letter brief of 4 pages, served on 12/19/01. PANEL [99-36115, 99-36206] (gar) [99-36115 99-36206]

12/26/01 Received Jeffrey S. Love for Ford Motor Company in 99-36206 letter dated 12/19/01 re: requesting removal from serice lists. [99-36115, 99-36206] (gar) [99-36115 99-36206]

12/27/01 Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 01-896 filed on 12/19/01. [99-36115, 99-36206] (gar) [99-36115 99-36206]

1/18/02 Filed order (James R. BROWNING, J. C. WALLACE, Thomas G. NELSON,): Aplt's mtn for stay of mandate is GRANTED pending the Supreme Court's decision. Aplts are hereby requested to keep the crt apprised of any changes &/or status in this case [99-36115, 99-36206] (mhf) [99-36115 99-36206]

2/25/02 Received notice from Supreme Court, petition for certiorari GRANTED on 2/19/02 . Supreme

Court No. 01-896 PANEL (gar) [99-36115 99-36206]

2/26/02 Received Bruce M Berman for Appellant Citibank (S.D.), NA letter dated 2/25/02 re: requesting continued stay of mandate pending Supr Ct decision in case. PANEL [99-36115, 99-36206] (gar) [99-36115 99-36206]

3/7/02 Filed order (James R. BROWNING, J. C. WALLACE, Thomas G. NELSON,): Pursuant to the Supreme Ct granting aplts' cert pet in this matter, the stay of mandate is hereby ext pending the Supreme Ct's final decision. Aplts are hereby requested to keep the ct apprised of any changes and/or status in this case. [99-36115, 99-36206] (gar) [99-36115 99-36206]

[Docket as of March 7, 2002 11:15 pm]

APPENDIX C

DOCKET NO. 1199 [FILED: Jan. 8, 1998]

BEFORE THE JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

IN RE FORD MOTOR COMPANY/CITIBANK N.A.
CARDHOLDER REBATE PROGRAM LITIGATION

BEFORE JOHN F. NANGLE, CHAIRMAN, ROBERT R. MERHIGE, JR.,WILLIAM B. ENRIGHT, CLARENCE A. BRIMMER, JOHN F. GRADY, BAREFOOT SANDERS AND LOUIS C. BECHTLE, JUDGES OF THE PANEL

TRANSFER ORDER

This litigation presently consists of four actions in the following federal districts: one action each in the Northern District of Illinois, Eastern District of New York, District of Oregon and Western District of Washington. Defendants in all actions, Ford Motor Company (Ford) and Citibank N.A. (Citibank), move to centralize, pursuant to 28 U.S.C. §1407, the four actions[1] for coordinated or consolidated pretrial proceedings. Plaintiffs in the Washington, New York and Illinois actions agree that centralization is appropriate; these parties and defendants agree that the Western District of Washington, where the first filed action is pending, is the appropriate transferee court for this litigation. The Oregon plaintiff opposes the motion on the ground that a motion to remand his action to Oregon state court is pending.

---

[1] The Panel has been notified that a potentially related action has been recently removed from Alabama state court to the federal court in the Northern District of Alabama. This action and any other related actions will be treated as potential tag-along actions. *See* Rules 12 and 13, R.P.J.P.M.L., 147 F.R.D. 589, 596-97 (1993).

On the basis of the papers filed and the hearing held, the Panel finds that the actions in this litigation involve common questions of fact concerning allegations that one or both defendants misrepresented or withheld information about the nature, extent and implementation of the Ford/Citibank cardholder rebate program and defendants' decision to discontinue this program. Centralization under Section 1407 in the Western District of Washington will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation, while accordingly being desirable in order to avoid duplication of discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel and the judiciary. We note that the Oregon plaintiffs remand motion can be presented to and decided by the transferee judge. *See, e.g., In re Ivy*, 901 F.2d 7 (2d Cir. 1990); *In re Air Crash Disaster at Florida Everglades on December 29, 1972*, 368 F. Supp. 812, 813 (J.P.M.L. 1973).

We are persuaded that the Western District of Washington is the most appropriate transferee forum for this litigation. We note that i) a related action is pending there, and ii) most of the parties favor centralization in this court.

IT IS THEREFORE ORDERED that, pursuant to 28 U.S.C. § 1407, the actions listed on the attached Schedule A and pending outside the Western District of Washington be, and the same hereby are, transferred to the Western District of Washington and, with the consent of that court, assigned to the Honorable William L. Dwyer for coordinated or consolidated pretrial proceedings with the action pending there.

FOR THE PANEL:

/s/ John F. Nagle
John F. Nangle
Chairman

SCHEDULE A

MDL-1199 -- In re Ford Motor Company/Citibank N. A. Cardholder Rebate Program Litigation

Northern District of Illinois

John McCauley v. Ford Motor Co., et al., C.A. No. 1:97-5627

Eastern District of New York

Gerald Essig, et al. v. Ford Motor Co., C.A. No. 1:97-4648

District of Oregon

Jeffrey Scott Merrick v. Ford Motor Co., et al., C.A. No. 3:97-1186

Western District of Washington

Howard S. Hornreich, et al. v. Ford Motor Co., et al., C.A. No. 2:97-1293

APPENDIX D

THE HONORABLE WILLIAM L. DWYER

UNITED STATES DISTRICT COURT DEPUTY
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE FORD MOTOR COMPANY/CITIBANK
(SOUTH DAKOTA), N.A. CARDHOLDER
REBATE PROGRAM LITIGATION

MDL Docket No. 1199 [FILED Jul. 22, 1998]
THIS DOCUMENT RELATES TO ALL CASES

CASE MANAGEMENT ORDER

I. PRETRIAL CONSOLIDATION AND COORDINATION

A. Consolidated Cases

By order of the Judicial Panel on Multidistrict Litigation ("MDL Panel"), the cases listed below have been consolidated for pretrial purposes:

- *Hornreich, et al. v. Ford Motor Co. and Citibank (South Dakota) N.A.*, C97-1293WD, originally removed to the United States District Court for the Western District of Washington at Seattle;
- *McCauley v. Ford Motor Co. and Citibank (South Dakota) N.A.*, C98-151 WD, originally removed to the United States District Court for the Northern District of Illinois;

- *Essig, et al. v. Ford Motor Company*, C98-152WD, originally removed to the United States District Court for the Eastern District of New York;
- *Merrick v. Ford Motor Co. and Citibank (South Dakota) N.A.*, C98-153 WD, originally removed to the United States District Court for the District of Oregon;
- *LaGrou v. Ford Motor Co.*, C98-226WD, originally removed to the United States District Court for the Central District of California;
- *Copeland v. Ford Motor Co.,* Alabama Case No. CV-97-PWG-266-2, C98-817WD, originally removed to the United States District Court for the Northern District of Alabama.

B. Applicability of Order

The terms of this Order shall apply automatically to the six actions listed above and to all other putative class actions concerning the subject matter of the six actions later instituted in, removed to, or transferred to this Court (including cases transferred for pretrial purposes under 28 U.S.C. § 1407).

C. Objections to Order

Objections to the terms of this Order must be filed by parties or their counsel within twenty (20) days of receipt of the Order (from any source).

D. Dissemination of Order

Plaintiffs' Lead Counsel shall immediately send (by overnight delivery) a copy of this Order to counsel in all actions to which this Order applies. Upon subsequently learning that this Order is or may be applicable to any other action, Plaintiffs' Lead Counsel shall immediately send (by overnight delivery) a copy of this Order to counsel in that action.

II. CASE IDENTIFICATION

The purpose of the following instructions is to reduce the time and expense of duplicate filings of documents through the use of a master case, while at the same time not congesting the master case with miscellaneous pleadings and orders that are of interest only to the parties directly affected by them.

A. Master Docket and Record

For the convenience of the parties and the Court, the Clerk of this Court will maintain a master docket with a single docket number and master record under the style "*In Re Ford Motor Company/Citibank (South Dakota), N.A. Cardholder Rebate Program Litigation*", Master Case No. MDL-1199. When an order, pleading or other document is filed and docketed in the master case, it shall be deemed filed and docketed in each individual case to the extent applicable and will not ordinarily be separately docketed or physically filed in any individual cases. However, the caption may also contain a notation indicating whether the document relates to all cases or only to specified cases, as described below.

B. Captions

All orders, pleadings, motions, and other documents shall bear the following caption:

[Caption omiited]

C. Master Filing

If the document(s) is generally applicable to all consolidated actions, the caption shall include the notation that it relates to "ALL CASES," and the Clerk will file and docket the document(s) only in the master record.

D. Separate Filing

If a document is intended to apply only to a particular case or cases, the caption shall indicate the case number of the case(s) to which it applies, and extra copies shall be

provided to the Clerk to facilitate filing and docketing both in the master record and the specified individual case record.

III. ORGANIZATION OF COUNSEL

A. Plaintiffs' Counsel

1. The firm of Hagens Berman P.S. shall be Plaintiffs' Lead Counsel.

2. In addition to the duties of being the authorized spokespersons for plaintiffs before the Court, Plaintiffs' Lead Counsel shall discharge the duties set forth below:

a. To coordinate and determine in briefs, oral argument or such other fashion as may be appropriate and to present (personally or by designee) to the Court and opposing parties, the position of the plaintiffs on all matters arising during all pretrial and trial proceedings;

b. To coordinate for plaintiffs the initiation and conduct of discovery, pretrial proceedings and trial:

c. To conduct settlement negotiations on behalf of plaintiffs;

d. To direct and coordinate the work of all plaintiffs' counsel and to make assignments of work to be performed in the prosecution of the case in a manner to assure that pretrial preparation is conducted effectively, efficiently and economically;

e. To monitor the activities of plaintiffs' counsel to assure that schedules are met and that unnecessary expenditures of time and expenses are avoided; and

f. To perform such other duties as may be incidental to proper coordination of plaintiffs' pretrial and trial activities or authorized by further order of the court.

3. Plaintiffs' Lead Counsel is hereby designated as the counsel for plaintiffs upon whom all notices, orders, pleadings, motions, discovery and memoranda are to be

served, except for case specific matters, which shall be served on lead counsel and the attorneys of record in that particular case.

4. Defendants' counsel may rely upon all agreements made with lead counsel, and such agreements shall be binding on all plaintiffs.

5. Defendants' stipulation to Pretrial Order No. 1 is not an indication that defendants participated in, agree with or take any position with respect to the allocation of responsibilities concerning plaintiffs and/or plaintiffs' counsel.

B. Plaintiffs' Executive Committee

1. The Plaintiffs' Executive Committee shall consist of the following:

Mr. John H. Alexander
Alexander, Fennerty & Green
168 North Michigan Avenue, Suite 800
Chicago, IL 60601

Mr. Michael J. Rosenfeld
Kalb, Rosenfeld & Essig
283 Commack Road
Commack, NY 11725

Mr. Roger W. Kirby
Kaufman Malchman Kirby & Squire, LLP
919 Third Avenue
New York, NY 10022

James G. Lewis
9911 W. Pico Blvd., Suite 503
Los Angeles, CA 90035

Michael L. Williams
Williams & Troutwine, P.C.

1001 SW 5th Ave., Suite 1900
Portland, OR 97204

2. The Plaintiffs' Executive Committee shall organize itself and agree on a plan for conducting the litigation on behalf of all plaintiffs and to advance all costs necessary. Plaintiffs' Executive Committee may, in concert with Lead Counsel, brief and argue motions, and consult with Plaintiffs' Lead Counsel on matters of common concern and conduct pretrial, trial, and post-trial proceedings in concert with Lead Counsel. Each attorney acting as counsel for any party herein who is a member in good standing of the bar of the Supreme Court of any state or of any United States District Court shall be deemed admitted *pro hac vice* before this Court, without further action, upon payment of the admission fee, in connection with these proceedings.

C. Defendants' Counse

John H. Beisner and Brian C. Anderson of O'Melveny & Myers LLP, Washington, D.C.; and Sidney R. Snyder, Jr. of Merrick, Hofstedt & Lindsey, Seattle, Washington are Defense Counsel for defendant Ford Motor Company, and may be assisted by other Counsel as defendant so determines. Christopher R. Lipsett and Bruce M. Berman of Wilmer, Cutler & Pickering, Washington, D.C. and Thomas L. Boeder of Perkins Coie, Seattle, Washington are Defense Counsel for defendant Citibank (South Dakota), N.A., and may be assisted by other Counsel as defendant so determines.

IV. SERVICE OF DOCUMENTS

A. Orders

The Clerk shall copy each order to Plaintiffs' Lead Counsel and to each Defendant's Counsel for distribution as appropriate to other counsel and parties.

B. Pleadings, Motions, and Other Documents

A party filing a pleading, motion, or other document shall provide (by overnight delivery) one copy each to Plaintiffs' Lead Counsel and to each member of Plaintiffs' Executive Committee and one copy to each Defendant's Counsel for distribution. Pursuant to Fed. R. Civ. P.5, service on Plaintiffs' Lead Counsel shall constitute service on other attorneys and parties for whom Plaintiffs' Lead Counsel is acting and service on each Defendant's Counsel shall constitute service on defendants and their Counsel, such service being deemed effective three (3) days after service on the Plaintiffs' Lead or Defendant's Counsel.

V. COURSE OF PROCEEDINGS

A. Consolidated Complaint

Should plaintiffs in all or some of the consolidated actions decide to file a consolidated complaint with respect to those actions, that complaint shall be filed within fifteen (15) days after this Order becomes effective.

B. Fed. R. Civ. P.12 Motions

Should defendant(s) decide to file a motion to dismiss any or all portions of a consolidated complaint, or a motion for judgment on the pleadings with respect to any existing complaint that has already been answered pursuant to Fed. R. Civ. P. 12, that motion shall be filed within thirty (30) days after the deadline for filing a consolidated complaint. This provision does not preclude the filing of other Rule 12 motions or other dispositive motions at other times, as appropriate. Plaintiffs' response to any Rule 12 motion shall be filed and served thirty (30) days thereafter, and defendant(s)' reply shall be filed and served fifteen (15) days thereafter.

C. Class Certification Matters

1. Exchange Of Initial Core Documents

Provided that all parties to the litigation have entered into a mutually acceptable confidentiality agreement, within

fifteen (15) days after entry of this Order, Defendants will produce to Plaintiffs' Lead Counsel all documents produced to the Federal Trade Commission in connection with its investigation of the termination of the Ford Rebate Program; and Plaintiffs will produce to Defendants' Counsel all core documents in the possession of each named plaintiff relating to their Ford/Citibank credit card and the Ford Rebate Program (*e.g.*, a sample bill containing the named plaintiffs credit card number; all cardholder agreements; documents concerning the Ford Rebate Program). Parties will not be required to respond to any formal discovery requests (*e.g.*, interrogatories, document requests, requests to admit) until thirty (30) days after the Court's final decision(s) on all Rule 12 motions.

2. General Class Certification Discovery

After the Court issues the last of its orders resolving all Rule 12 motions, the parties will have sixty (60) days to complete general discovery designed to create an evidentiary record upon which plaintiffs' class certification motion can be briefed and decided (the "Class Certification Discovery Period").

3. Plaintiffs' Class Certification Motion(s)

Within fifteen (15) days after the conclusion of the Class Certification Discovery Period, plaintiffs shall file any motions to certify proposed classes under Fed. R. Civ. P.23 and a memorandum setting forth their arguments in support of said motion, and the evidentiary basis therefor. At the same time, plaintiffs shall identify all experts and witnesses upon whom they will rely in support of their motion (including the information contemplated by Fed. R. Civ. P. 26(a)(2)(B) as to experts) and file any expert reports or affidavits upon which they rely in support of their class certification motion(s). Plaintiffs shall not rely on any experts in support of class certification that are not identified at this time.

4. Defendants' Class Certification Opposition

If plaintiffs' class certification papers identify no experts or other witnesses in support of class certification, defendants shall file briefing setting forth their arguments in opposition to plaintiffs' motions, and the evidentiary basis therefor, within thirty (30) days after the filing of plaintiffs' class certification motion(s). At the same time, defendants shall identify all experts and witnesses upon whom they will rely in opposing plaintiffs' class certification motion(s) (including the information contemplated in Fed. R. Civ. P. 26(a)(2)(B) as to experts), and file any expert reports or affidavits upon which they rely in opposing plaintiffs' class certification motion(s). Defendants shall not rely on any experts in opposition to class certification that are not identified at this time. If plaintiffs' class certification papers identify new experts and/or other witnesses, then the briefing schedule shall be amended to provide an additional thirty (30) days for taking discovery of such experts/witnesses and for filing an opposition brief.

5. Plaintiffs' Reply Memorandum

If defendants' class certification papers identify no experts or other witnesses in opposition to class certification, plaintiffs may file a reply memorandum in support of their class certification motion(s) within fifteen (15) days after the filing of defendants' opposition briefing. The reply memorandum shall be confined to responding to arguments made in defendants' opposition memorandum. If defendants' class certification papers identify new experts and/or other witnesses, then the briefing schedule shall be amended to provide an additional fifteen (15) days for taking discovery of such experts/witnesses and for filing an opposition brief.

6. Class Certification Hearing

After the filing of all briefing concerning plaintiffs' class certification motion, the Court may, at its discretion, schedule a hearing on any class certification motions.

D. Motions to Strike Class Allegations

Defendants may file a motion to strike any or all class allegations at any time. Such a motion will be heard and considered in due course.

E. Pleadings

Except for good cause shown, no additional named plaintiffs or other parties may be added to existing actions more than fifteen (15) after the effective date of this Order.

F. Further Orders

Following the entry of orders disposing of class certification issues, the Court shall, if necessary, enter a further management order regarding completion of discovery on the merits, summary judgment motions, and trial.

VI. DISCOVERY

A. General Rules

1. Filing Discovery Requests and Responses

Pursuant to Fed. R. Civ. P. 5(d), discovery requests and responses will not be filed with the Court except when specifically ordered by the Court or to the extent offered in connection with a motion.

2. Attempt to Resolve Disputes

To avoid unnecessary litigation concerning discovery disputes, counsel are directed to meet and confer before filing any motion on discovery issues. In any motion filed, counsel for the moving party must certify that a good faith effort was made to resolve the dispute.

3. Confidentiality

Prior to any discovery being produced to any party (either the exchange of initial core documents described in Section V.C.1 above, or formal discovery described in Section V.C.2 above, counsel for the parties shall agree to

and sign a Confidentiality Order covering said discovery. Such Confidentiality Order shall generally be based on the model provided in the *Manual for Complex Litigation, Third*.

B. Discovery Requests

Counsel shall, to the extent possible, combine their interrogatories, requests for admission and document requests to any party into single sets of interrogatories, requests for admission and document requests (collectively, "discovery requests"). No question shall be asked that has already been answered in response to discovery requests filed by another party unless there is reason to believe that a different answer will be given. Requests made by the defendant of each named plaintiff are not, for purposes of class certification discovery, duplicative requests. The party served with the discovery requests shall answer and/or object in the manner described in the Federal Rules of Civil Procedure and applicable local rules.

SO ORDERED:

Dated: July 21, 1998

/s/ William L. Dwyer
United States District Judge

Presented by

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APPENDIX E

The Honorable William L. Dwyer

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE FORD MOTOR CO/CITIBANK N.A.
CARDHOLDER REBATE PROGRAM
LITIGATION

MDL 1199

CONSOLIDATED COMPLAINT

Plaintiffs, by their undersigned attorneys, bring this action on behalf of themselves and all other persons similarly situated on information and belief based on the investigation of counsel, except those allegations that pertain to the plaintiffs or their attorneys (which are alleged on personal knowledge), and hereby allege as follows:

NATURE OF THIS ACTION

1. This is a consolidated class action brought on behalf of a class of all persons who were holders of VISA and MasterCard credit cards issued by defendants Ford Motor Company ("Ford") and Citibank (South Dakota) N.A. ("Citibank") from the time the two companies began issuing a Ford Citibank "co-branded" credit card (the "Card") in February 1993 through December 31, 1997.

2. In order to promote sales of Ford cars and trucks, the Ford Citibank Card promised cardholders in good standing that they could earn up to $700 in rebates over any consecutive 12-months for a maximum rebate of $3,500 over a 5-year period (the "rebate program"). Unlike most credit

card "rebate" offers, the Ford/Citibank card thus offered a discount on new Ford vehicle purchases that was equivalent to cash and thus of indisputable value to plaintiffs and class members.

3. On or about June 30, 1997, one or both of the defendants sent a letter to plaintiffs and millions of other cardholders unilaterally terminating the rebate feature of the program. According to the letter, no rebates will be credited to any cardholder after December 31, 1997. The reason for this unilateral termination -- the program was too successful.

4. The unilateral termination of the rebate program leaves class members with two equally poor choices. They can either give up the rebates they have already earned and forfeit the benefits defendants promised them or they can buy a new Ford vehicle using the small rebates they have already earned, thereby paying thousands more than they had planned.

5. Either way, Ford will reap the benefit of billions of dollars in rebates that will never be redeemed or will never be earned after January 1, 1998. According to one credit card industry research firm, Ford has paid out $500 million in rebates so far to 500,000 cardholders. Its potential liability for current and future redemptions by all six million of its cardholders, however, is in excess of $21 billion.

6. This action seeks to hold Ford and Citibank to their end of the bargain. The complaint alleges causes of action for breach of contract, unjust enrichment, and consumer fraud.

THE PARTIES

7. Plaintiffs Howard and Lynette Hornreich are residents of Kent, Washington who are holders of the Ford Citibank Card.

8. Plaintiff Gerald Essig is a resident of Suffolk County, New York who is a holder of a Ford Citibank Card.

9. Plaintiff Thomas Walters is a resident of Suffolk County, New York who is a holder of a Ford Citibank Card.

10. Plaintiff John B. McCauley is a resident of Cook County, Illinois who is a holder of a Ford Citibank Card.

11. Plaintiff John La Grou is a resident of the State of California who is a holder of a Ford Citibank Card. Pursuant to California Civil Code § 1782, plaintiff provided defendants with notice of his claim under California's Consumers Legal Remedies Act prior to filing suit.

12. Defendant Ford Motor Company is a Delaware corporation with its principal offices in Dearborn, Michigan.

13. Defendant Citibank is a National Association Bank registered to do business in the United States of America by the Federal Reserve Board and Department of Treasury, Comptroller of Currency Division. Citibank is headquartered in Sioux Falls, South Dakota.

JURISDICTION AND VENUE

14. This Court has jurisdiction pursuant to 28 U.S.C. § 1332.

15. The action is properly venued in this district pursuant to order of the Judicial Panel on Multidistrict Litigation dated January 8, 1998.

SUBSTANTIVE ALLEGATIONS

16. The Ford Citibank Card was the product of a joint venture between the second largest car manufacturer in the United States -- Ford -- and the largest credit card issuer in the United States -- Citibank.

17. In September 1992, Ford's competitor, General Motors ("GM") introduced the first automotive rebate card. The GM card permitted cardholders to accumulate rebate points toward the purchase of a new General Motors vehicle. The GM card was so successful that, by February 1993, over

4.5 million GM cards had been issued with nearly $2 billion in outstanding account balances.

18. The Ford Citibank Card was a direct response to the success of the GM card. Ford feared that car buyers would be induced to purchase more GM vehicles because of the popularity of the GM card. As David Robertson, President of the Nilson Report, noted: "Ford really had to do this after GM's success."

19. Citibank, too, had a competitive motive. It feared the continuing attrition of its credit card portfolio as its customers switched their credit card balances to the GM card. According to the Nilson Report, 8% of Citibank's cardholders had canceled their accounts the previous year, and the GM card was the fastest growing card on the market.

20. Accordingly, in February 1993, Ford and Citibank began issuing a co-branded Ford Citibank credit card that would permit cardholders to earn rebates similar to those earned with the GM card. Every time a customer used the Ford Citibank Card, he earned a rebate equivalent to 5% of the purchase price. A customer could earn up to $700 in rebates in any 12-month period (representing charges up to $14,000), for a maximum rebate of $3,500 -- the same rebate ceiling as the GM card. The rebate could be applied to the purchase of a new Ford vehicle -- it was as good as cash.

21. To publicize the new Card, defendants sent uniform direct mail solicitations to most of Citibank's 30 million cardholders and all of Ford's 20 million customers.

22. Ford understood -- and promoted -- that the primary benefit of its card offered was savings on Ford cars. Thus, one standard solicitation sent to Ford and Citibank customers included the following:

"A 5% Ford Rebate on Every Purchase"

"How can you save hundreds, even thousands of dollars on the cars and light trucks more people want to drive? Get the Ford Citibank Card."

"Savings on some of America's Best Selling Cars and Trucks"

"So get the Ford Citibank Card and start earning savings toward your next new car."

(Emphasis in original.)

23. To distinguish their card from GM's, defendants promoted the Card as the fastest way to reach the maximum rebate. Ford's multimillion dollar nationwide advertising campaign touted that its card permitted cardholders to reach the maximum "Up to two years faster than any other auto company card." Ford was able to make this claim because, although both cards had rebate ceilings of $3,500, Ford Citibank cardholders could earn up to $700 per year, while GM cardholders could earn only $500 per year. Thus, Ford Citibank cardholders could reach the maximum rebate in only five years, while GM cardholders would take seven years to achieve the same rebate.

24. The difference in how fast Ford Citibank cardholders could achieve the maximum rebate was the key promotional feature of the Card. As James Bailey, Citibank's Executive Vice-President of North American Consumer Banking stated, "The chief selling point is that consumers can amass rebates quickly."

25. At its introduction, defendants announced that the new card would become "the most widely-held auto rebate card in America in a matter of months." As it turned out, the card was enormously successful for Ford and Citibank. At the time Ford terminated the rebate program, over six million consumers held the Card.

26. By informing consumers that they could earn up to $3,500 at a rate of $700 per year, Ford falsely and

misleadingly claimed or implied in its advertising and literature disseminated to cardholders and to the public at large that the rebate program would be available for at least five years and that cardholders would have the opportunity to earn the full $3,500 rebate.

27. Defendants have reaped vast profits from the Card. In addition to the variable credit card interest payments that began at an initial rate of 15.4% *per annum*, defendants collect bank interchange fees every time the Card is used. Moreover, only cardholders in good standing with their accounts are eligible for rebates, so cardholders have an extra incentive to stay current with their payments.

28. After plaintiff and members of the class kept their part of the bargain for years, on or about June 30, 1997, defendants sent a letter to their cardholders announcing the unilateral termination of the rebate program. The letter announced that after December 1, 1997, no further rebates could be earned on purchases using the Card. Rebates already earned would expire five years after the calendar year in which they were earned. Cardholders who wish to close their accounts will receive Ford rebate certificates that expire a mere 45 days after the accounts are closed.

29. In a pamphlet that accompanied the June 30, 1997 letter, Ford claimed that it terminated the rebate program because it had "decided that giving Rebates on credit card purchases is not as effective in marketing cars and trucks in 1997 as it was in 1993 when the program was launched." Ford further claimed that "[t]he decision to discontinue the program will let Ford use the resources that would have been required to continue the program for other marketing initiatives..."

30. Despite these claims, the true reason Ford discontinued the rebate program was that the program was quickly becoming unprofitable due to its success. By 1996, Ford had already provided more than $500 million in rebates

to nearly 500,000 cardholders. Ford's future liability, if all six million cardholders redeemed their rebates, was approximately $21 billion.[1] Indeed, Ford noted that its contingent liability was growing by more than 20% every year. According to Ford's annual report, the contingent liability of those rewards was $2.3 billion in 1994, $3.1 billion in 1995 and $4.1 billion in 1997. The problem with the rebate program was not that it was not effective in selling Ford cars and trucks, but rather that it was too effective such that Ford unilaterally determined that it would not make as much money with the Card as it had expected. Thus, by the time defendants canceled the Card, they potentially faced owing class members over $20 billion.

31. Cardholders were offered two choices by defendants, both of which reward Ford and Citibank for luring millions of consumers to use the Card rather than another credit card they could have used to accumulate cash rebates, frequent flyer miles, or other benefits. Ford and Citibank failed to offer members with accumulated rebates any form of compensation such as cash or merchandise credits.

32. Cardholders who needed to accumulate the maximum rebate of $3,500 in order to afford a new Ford will effectively lose all benefits of the rebate program. Unable to afford a Ford with only the lesser rebates they had earned prior to December 31, 1997, they will have no choice but to allow their rebate credits to expire unused. Ford will thereby wipe potentially billions of dollars of liability off its books.

33. Cardholders who are able to make use of their rebate credits by purchasing a new Ford will pay more for their vehicles than if they were permitted to continue accumulating rebates after December 31, 1997, thereby

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[1] This figure is derived by multiplying the six million outstanding cardholders by $3,500 -- the full rebate amount permitted per cardholder.

increasing Ford's profit on every vehicle sold. Either way, Ford wins and its cardholders lose.

CLASS ACTION ALLEGATIONS

34. This action is brought pursuant to Rule 23 of the Federal Rules of Civil Procedure and meets the requirements of subparts 23(a),(b)(2) and (b)(3). The Class satisfies the numerosity, commonality, typicality, adequacy, predominance, and superiority requirements of those provisions, and is composed of the following persons and entities:

> All persons and entities who were holders of VISA and MasterCard credit cards issued by Ford and Citibank from February, 1993 through December 31, 1997.

35. The members of the Class are so numerous that joinder of all Class members is impracticable. Although the exact number of Class members can be determined only through appropriate discovery, plaintiffs believe that the Class includes nearly six million (6,000,000) members.

36. Plaintiffs' claims are typical of the claims of the members of the Class. Plaintiffs and all members of the Class sustained damages as a result of defendants' wrongful conduct as complained of in this action. Plaintiffs will fairly and adequately protect the interests of the members of the Class and have retained counsel competent and experienced in class action litigation.

37. The class action is superior to all other available methods for the fair and efficient adjudication of this controversy. Because the damages suffered by the members of the Class may be relatively small, the expense and burden of individual litigation make it virtually impossible for plaintiffs and members of the Class individually to seek redress for the wrongful conduct complained of.

38. Common questions of law and fact exist as to all members of the Class and predominate over any questions affecting solely individual members of the Class. Among the questions of law and fact common to the Class are:

a. Whether defendants distributed a standardized direct mail solicitation to millions of consumers;

b. Whether the rebate program was a material element of the contracts between defendants and members of the class;

c. Whether defendants breached their contracts with members of the class;

d. Whether plaintiffs are entitled to specific performance of the rebate program feature of the contracts;

e. Whether defendants were unjustly enriched by their unilaterally termination of the rebate program;

f. Whether defendants violated the consumer protection statutes of Washington and other states;

g. Whether Class members sustained damages and, if so, what is the proper measure of such damages.

39. The Class is readily definable and the prosecution of this action as a class action will reduce the possibility of repetitious litigation. The names, addresses and rebate account information of class members is maintained by defendants in computerized files. Plaintiffs know of no difficulty that will be encountered in the management of this litigation which would preclude its maintenance as a class action.

FIRST CAUSE, OF ACTION
(Breach of Contract)

40. Plaintiffs repeat and reallege each and every allegation set forth above as if fully set forth herein.

41. Plaintiffs and the members of the Class entered into standardized written agreements with Citibank and Ford whereby Ford expressly agreed to enroll all holders of the Card in the Ford Rebate Program.

42. The Rebate Program was a material part (if not the material part) of the contract between defendants and holders of the Card.

43. Defendants breached their contracts with plaintiffs and Class members by unilaterally terminating the Rebate Program -- the most important feature of the Card.

44. Any language in the contract purporting to give defendants the unilateral right to terminate the Rebate Program in this manner is void as unconscionable and against public policy, and is a breach of defendants' duty of good faith and fair dealing. Moreover, defendants did not adequately disclose its unilateral right to terminate to cardmembers when enrolling them as Ford/Citibank cardmembers. The fact that the Card was vastly successful does not and should not provide defendants with an excuse to avoid their contractual obligations.

45. As a result of defendants' breach of contract and good faith and fair dealing, plaintiffs and the members of the Class have been damaged in an amount to be proved at trial.

46. Plaintiffs and the members of the Class are entitled to specific performance of the contract, and in particular, specific performance of the terms of the contract pertaining to the rebate program.

SECOND CAUSE OF ACTION
(Violation of Consumer Protection Statutes)

47. Plaintiffs repeat and reallege each and every allegation set forth above as if fully set forth herein.

48. Defendants' unilateral termination of the rebate program, after signing millions of cardholders based on the representation that they could earn the maximum rebate of

$3,500 over a period of five years is an unfair and deceptive act. To the extent defendants maintain that they had right to unilaterally terminate cardholder agreements, defendants engaged in a deceptive act because it was not adequately disclosed.

49. All 50 states and the District of Columbia have enacted statutes to protect consumers from unfair, deceptive or fraudulent business practices, unfair competition and false advertising. Most states, including Washington, allow consumers a private right of action under these statutes. The statutes which allow consumers a private right of class action to seek redress are as follows:

Alaska	Alaska Stat. § 45,50-471 *et seq.*
Arizona	Ariz. Rev. Stat. Ann. §§ 44-1521 -- 44-1534
Arkansas	Ark. Stat. Ann. §§ 70-901-70-929
California	Calif. Civ. Code §§ 1770, *et seq.*, Business & Profession Code, §§ 17200 and 17500
Connecticut	Conn. Gen. Stat. Ann. §§ 42-110a - 42-110g
Colorado	Col. Rev. Stat. §§ 6-1-101 - 6-1-114
Delaware	6 Del. Code Ann. §§ 2511-2537
Florida	D.C. Code Ann. §§ 28-3801 - 28-3829
Georgia	Fla. Stat. Ann. §§ 501.201 - 501.213
Hawaii	Ga. Code Ann. §§ 10-1 - 10-370
Idaho	Idaho Code §§ 48-601 - 48-619
Iowa	Iowa Code § 714.16
Illinois	815 ILCS § 505/2
Kansas	Kan. Gen. Stat. Ann. §§ 50-623 - 50-644
Kentucky	Ky. Rev. Stat. Ann. §§ 367-110 - 367-990
Louisiana	La. Rev. Stat. Ann. §§ 13:1401 - 13:1418
Maine	Me. Rev. Stat. Ann. §§ 206-214
Maryland	Md. Code Ann. §§ 13-501

Massachusetts	Mass. Gen. L. Ann. Ch. 93A, §§ 1-11
Minnesota	Minn. Stat. Ann. §§ 325D.09 - 325D.16
Mississippi	Miss. Code Ann. §§ 75-24-1 - 75-24-61
Missouri	Mo. Ann. Stat. §§ 407.010 - 407.701
Montana	Mont. Rev. Code Ann. §§ 30-14-101 - 30.14-224
Nebraska	Neb. Rev. Code §§ 59-1501 - 59-1623
Nevada	Nev. Rev. Stat. §§ 59A-101 - 590A.280
New Jersey	N.J. Stat. Ann. §§ 56:8-1 - 56:8-24
New Mexico	N.M. Stat. Ann. § 57-12-10
New York	N.Y. Gen. Bus. L. §§ 349-350
North Carolina	N.C. Gen. Stat. §§ 75-1 - 75-56
Ohio	Ohio Rev. Code Ann. §§ 1345-09
Oregon	Ore. Rev. Stat. §§ 646.605 - 646.642
Pennsylvania	73 Pa. Stat. § 20.1 *et seq.*
Rhode Island	R.I. Rev. L. Ann. §§ 6-13-1-1 - 6-13-1-11
South Carolina	S.C. Code Ann. §§ 369-5-10 - 39-5-160
South Dakota	S.D. Comp. L. §§ 37-24-1 - 37-24-35
Texas	Tex. Rev. Civ. Stat. §§ 13-11-19
Utah	Utah Code Ann. § 13-11-19
Vermont	Vt. Stat. Ann. §§ 2451-2462
Washington	RCW § 19.86.010, *et seq.*
Wisconsin	Wis. Stat. Ann. § 100.18
Wyoming	Wyo. Stat. Ann. §§ 40-12-101 - 40-12-112

50. The deceptive claims defendants made were contained in uniform direct mail solicitations and nationwide advertisements. These standardized promotional materials promised Class members they could, *e.g.*, continue earning rebates up to $3,500 at the maximum rate of $700 per year. These solicitations and advertisements did not adequately disclose that Ford and Citibank reserved to themselves the unilateral right to terminate the rebate program.

51. Defendants' actions constitute unfair and deceptive practices within the meaning of the consumer protection statutes of the aforementioned states.

52. Plaintiffs and Class members were damaged by defendants' unfair and deceptive acts.

53. By reason of the foregoing, plaintiffs and the Class are entitled to recover compensatory and punitive damages for defendants' violation of consumer protection statutes in an amount to be proved at trial.

THIRD CAUSE OF ACTION
(Unjust Enrichment)

54. Plaintiffs repeat and reallege each and every allegation set forth above as if fully set forth herein.

55. Defendants have profited from the interest charges and intercharge fees they collected as a result of the billions of dollars that Class members, including plaintiffs, charged on their Ford Citibank Cards.

56. Plaintiffs and Class members have foregone using other credit cards that would have earned them cash rebates, frequent flyer miles, and other benefits.

57. Defendants' unilateral termination of the rebate program will result in the expiration of billions of dollars in rebates earned by plaintiffs and Class members.

58. Defendants have been unjustly enriched to the detriment of plaintiffs and Class members by their unilateral termination of the rebate program.

59. By reason of the foregoing, plaintiffs and Class members are entitled to recover from defendants the benefit defendants received from their unilateral termination of the rebate program, as it would be unjust and inequitable to permit defendants to retain this ill-gotten benefit.

WHEREFORE, plaintiffs, on their own behalf and on behalf of the Class, demand judgment as follows:

A. Declaring this action to be a proper class action and designating representative plaintiffs and lead counsel;

B. Awarding compensatory damages to plaintiffs and Class members;

C. Awarding specific performance of the Rebate Program to plaintiffs and Class members;

D. Awarding punitive damages to plaintiffs and Class members;

E. Enjoining defendants from continuing their deceptive practices;

F. Awarding plaintiffs and Class members their costs and expenses incurred in this action, including reasonable attorneys' fees and experts' fees; and,

G. Awarding such other and further relief as this Court may deem just and proper.

DATED: August 5, 1998.

HAGENS BERMAN, P.S.

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APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE
FORD MOTOR COMPANY/CITIBANK
(SOUTH DAKOTA), N.A. CARDHOLDER
REBATE PROGRAM LITIGATION

NO. MDL-1199 [FILED: Oct. 14, 1999]

THIS DOCUMENT RELATES TO ALL CASES

ORDER TO SHOW CAUSE

Six separately filed actions against defendants Ford Motor Company and Citibank (South Dakota), N.A., have been transferred to this court by the Judicial Panel on Multidistrict Litigation for consolidated pretrial proceedings. A consolidated complaint was filed on August 5, 1998, on behalf of plaintiffs and a putative nationwide class. Plaintiffs have pleaded diversity jurisdiction under 28 U.S.C. § 1332(a), which requires that the matter in controversy exceed $75,000. They allege that the defendants misrepresented or withheld information about the nature and duration of the Ford/Citibank cardholder rebate program and then wrongfully discontinued that program. Plaintiffs have moved for class action certification under Fed. R. Civ. P. 23, and that motion is pending.

In the current briefs, no party has mentioned the court's jurisdiction. Subject matter jurisdiction, however,"cannot be stipulated to by the parties. . . and the court sua sponte must satisfy itself that jurisdiction exists." *Rincon Band of Mission Indians v. County of San Diego*, 495 F.2d 1. 8 (9th

Cir. 1974) (citing *California v. LaRue*, 409 U.S. 109 (1972); *Mansfield C. & L.M.R.Co. v. Swan*, 111 U.S. 379, 382 (1884)). Any question in that respect should be resolved before the class certification motion is decided.

In *Zahn v. International Paper Co.*, 414 U.S. 291, 301 (1973) the Supreme Court held that "[e]ach plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount." *See also Goldberg v. CPC-Int'l, Inc.*, 678 F.2d 1365, 1367 (9th Cir.1982) (rejecting argument that the amount in controversy requirement could be met by attributing attorneys' fees "to the named plaintiffs only . . . [or] to the class as a whole and treated as a common find"); *Snow v. Ford Motor Co.*, 561 F.2d 787, 790 (9th Cir. 1977) ("where the equitable relief sought is but a means through which the individual claims may be satisfied, the ban on aggregation applies with equal force to the equitable as well as the monetary relief"); *Kanter v. Warner-Lambert Co.*, 52 F. Supp. 2d 1126, 1129-1132 (N.D. Cal. 1999) ("[a]ggregation of punitive damages to meet the jurisdictional minimum is not permitted in this circuit"); *Smiley v. Citibank (South Dakota), N.A.*, 863 F. Supp. 1156, 1162-63 (C.D. Cal. 1993). The parties are therefore ordered to show cause in writing by October 21, 1999, why the consolidated action herein should not be dismissed for lack of jurisdiction, and why *Copeland v. Ford Motor Co.*, No. C98-817WD, *Essig v. Ford Motor Co.* No. C98-152WD, *Hornreich v. Ford Motor Co.*, C97-1293WD, *LaGrou v. Ford Motor,* No. C98-226WD, *McCanley v. Ford Motor Co.*, No. C98-151 WD, and *Merrick v. Ford Motor Co.*, No. C98-153 WD, should not be dismissed for lack of jurisdiction (if initially filed in federal court) or remanded to state court. Each side may file a single brief, not to exceed twelve pages, on that subject.

The clerk is directed to send copies of this order to all counsel of record.

Dated: October 14, 1999.

/s/ William L. Dwyer
William L. Dwyer
United States District Judge

APPENDIX G

The Honorable William L. Dwyer

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE FORD MOTOR COMPANY/CITIBANK (SOUTH DAKOTA), N.A. CARDHOLDER REBATE PROGRAM LITTGATION

MDL Docket No. 1199
THIS DOCUMENT RELATES TO ALL CASES

PLAINTIFFS' RESPONSE TO ORDER TO SHOW CAUSE

I. INTRODUCTION

Plaintiffs respond to the Court's October 14, 1999 order to show cause by stating that it was defendants, not plaintiffs, who removed six individual state actions to federal court on the premise that the cases satisfied the jurisdictional requirements of 28 U.S.C. § 1332(a), including the matter in controversy amount of $75,000. Therefore, defendants are the proper parties to show cause why the case should not be dismissed for lack of jurisdiction and why the individual cases should not be remanded to state courts.

II. PROCEDURAL HISTORY OF THE CASE

This case is a consolidation of six separately filed actions against defendants Ford Motor Company and Citibank (South Dakota), N.A. The cases were transferred to this court by the Judicial Panel on Multidistrict Litigation for consolidated pretrial proceedings. A consolidated complaint

was filed on August 5, 1998 on behalf of plaintiffs and a putative nationwide class.

The six original cases were filed in various state courts.[1] Within days of the respective filings, defendants removed each of the cases to federal court. Defendants' stated bases for removal were identical in each jurisdiction: (1) complete diversity between themselves and plaintiffs; and (2) a claim that the relief sought satisfied the $75,000 jurisdictional amount. The latter was based on an aggregation of plaintiffs' damages.

III. DISCUSSION

The *Hornreich* plaintiffs made a strategic decision not to move to remand the case to state court. Challenging defendants' removal of the case to federal court could have resulted in a protracted jurisdictional battle that would drain plaintiffs' time and resources and delay pursuit of the merits of plaintiffs' claims. Further, defendants' aggregation of damages to meet the jurisdictional requirement was at least arguable under the law of some jurisdictions. *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353 (11th Cir. 1996); *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, *reh'g en banc, denied*, 70 F.3d 26 (5th Cir. 1995). However, although not settled in recent years, the law of the Ninth Circuit suggests that aggregation does not provide a basis for jurisdiction. *Goldberg v. CPC Int'l. Inc.*, 678 F.2d 1365 (9th Cir.)("separate claims must be considered separately and each class member's claim must satisfy the jurisdictional amount"), *cert. denied* 459 U.S. 945 (1982); *Snow v. Ford*

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1 *Hornreich v. Ford Motor Co* was filed in King County Superior Court, Washington State; *McCauley v. Ford Motor Co.* was filed in Cook County Court, Illinois; *Essig v Ford Motor Company* was filed in Suffolk County Court,, New York; *Merrick v. Ford Motor Co.* was filed in Multnomah County, Oregon; *Copeland v. Ford Motor Co.* was filed in the circuit court of Tuscaloosa, Alabama; and *La Grou v. Ford Motor Co.* was filed in Superior Court of the State of California.

Motor Co., 561 F.2d 787, 790 (9th Cir. 1977)("the ban on aggregation [applies] with equal force to the equitable as well as the monetary relief")(citations omitted). Thus, the trend suggests jurisdiction is questionable. Again, rather than fight this issue, plaintiffs consented to removal.

IV. CONCLUSION

Defendants removed the six original cases from the state courts where they were filed. Therefore, defendants are the appropriate parties to address the question of this court's subject matter jurisdiction. Plaintiffs acknowledge that although not settled in recent years, the trend in the Ninth Circuit suggests that jurisdiction is questionable.

DATED: 21 October 1999

HAGENS BERMAN, P.S.

By /s/ Steve W. Berman

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APPENDIX H

THE HONORABLE WILLIAM L. DWYER

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE FORD MOTOR COMPANY/CITIBANK (SOUTH DAKOTA), N.A. CARDHOLDER REBATE PROGRAM LITIGATION

NO. C98-153WD
MDL Docket No. 1199
THIS DOCUMENT RELATES TO ALL CASES

DEFENDANTS' MEMORANDUM IN RESPONSE TO ORDER TO SHOW CAUSE

Defendants Ford Motor Company ("Ford") and Citibank (South Dakota), N.A. ("Citibank" and, collectively, "defendants") respectfully submit this memorandum in response to the Court's Order to Show Cause dated October 14, 1999 ("Order").

I. INTRODUCTION

Defendants agree with the Court that subject matter jurisdiction "cannot be stipulated to by the parties" (Order at 1 (citing *Rincon Band of Mission Indians v. County of San Diego*, 495 F.2d 1, 8 (9th Cir. 1974)). The jurisdictional analysis in a case premised on diversity jurisdiction (such as this case), however, differs significantly from the analysis in cases premised on federal question jurisdiction (such as *Rincon*). In a federal-question case, the existence of subject matter jurisdiction is a question of law to be resolved according to the well-pleaded complaint rule. *See Toumajian v. Frailey*, 135 F.3d 648, 653 (9th Cir. 1998). In a diversity

case, however, jurisdiction is an ***evidentiary*** issue. Courts look to a wide variety of evidence to determine whether the jurisdictional amount requirement of 28 U.S.C. § 1332 is met, including the fact that the plaintiff himself pleads the existence of federal jurisdiction; the projected cost to the defendant of complying with any requested injunctive relief; and any request the plaintiff has made for punitive damages, among other things. If a "preponderance of [the] evidence" supports a finding that the plaintiff has put in controversy an amount exceeding $75,000 in a case between citizens of different states,[1] federal diversity jurisdiction exists. *See Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 376 (9th Cir. 1997).

As long as the "preponderance of the evidence" standard is met, both the Supreme Court and the Ninth Circuit have repeatedly made clear that litigants have an unmitigated ***right*** to litigate in federal court a case that satisfies the statutory requirements for federal subject matter jurisdiction. *See, e.g., Meredith v. City of Winter Haven*, 320 U.S. 228, 234 (1943) (diversity jurisdiction "was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, ***at their option***, to assert their rights in the federal rather than in the state courts.") (emphasis added); *Mach-Tronics, Inc. v. Zirpoli*, 316 F.2d 820, 824 (9th Cir. 1963) ("It has long been recognized that when a federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction."). As explained below, the evidence overwhelmingly shows that

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1 The Court's Order does not appear to question the complete diversity of citizenship between the parties. As the pleadings make clear, plaintiffs are citizens of Alabama, New York, Washington, California, Illinois, and Oregon; defendants are deemed citizens of Delaware and Michigan (Ford), and South Dakota (Citibank).

the jurisdictional requirements of 28 U.S.C. § 1332 are satisfied in this case.[2]

II. DISCUSSION

The pleadings and other record materials are replete with evidence showing that diversity jurisdiction exists in this case. The plaintiffs themselves have pleaded the existence of federal jurisdiction. (See Compl. ¶ 14.) The Ninth Circuit has held that plaintiffs' jurisdictional admissions are to be accorded great weight in the jurisdictional analysis. *See Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 376 (9th Cir. 1997) (finding jurisdictional amount requirement satisfied because of plaintiff's "formal judicial admission that the amount in controversy exceeds $50,000"). Other courts have reached the same conclusion. For example, in *Miller v. American Home Prods. Corp.*, No. 95-3567, 1996 U.S. Dist. LEXIS 2413 (E.D. La. Feb. 28, 1996) (attached at Tab 1), the court gave controlling weight to the fact that the plaintiff had filed a state-court complaint that included a jury demand. Under state rules, a jury demand could only be made if the amount in controversy exceeded $50,000. Upon removal to federal court by the defendant, the plaintiffs attempted to deny the existence of jurisdiction by submitting an affidavit stating that they did not seek more than $50,000. The court rejected plaintiffs' motion to remand the case to state court, noting that "[i]t is undisputed that plaintiffs made a jury

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2 This action originated when the Judicial Panel on Multidistrict Litigation transferred six separate actions to this Court for consolidated pretrial proceedings. Rather than proceed under the six separate complaints that existed at the time, counsel for plaintiffs in all six actions submitted a single Consolidated Complaint ("Compl.") on behalf of all plaintiffs. As the single operative complaint in these consolidated actions, the Consolidated Complaint supersedes the original six complaints as the touchstone both of plaintiffs' substantive claims and of this Court's jurisdictional analysis. *Cf. Mann v. City of Tucson*, 782 F.2d 790, 794 (9th Cir. 1986) (diversity jurisdiction is assessed by reference to the allegations contained in the operative complaint).

demand in their state court petition. Therefore, plaintiffs' petition reveals on its face that at least one of plaintiffs' claims exceeds the jurisdictional minimum of $50,000." *Id.* at *3 (citation omitted). As in *Singer* and *Miller*, the fact that plaintiffs themselves formally admit the existence of jurisdiction in their complaint powerfully shows that they have placed in controversy an amount exceeding the jurisdictional minimum.

A. THE VALUE OF THE RELIEF SOUGHT BY THE PUTATIVE CLASS TO VINDICATE THEIR "COMMON AND UNDIVIDED INTERESTS" EXCEEDS THE MINIMUM JURISDICTIONAL AMOUNT

1. Because Plaintiffs Have A Common And Undivided Interest In The "Specific Performance" Requested By The Consolidated Complaint, The Amount-In-Controversy Requirement Is Satisfied Based On The Cost Of Complying With A "Specific Performance" Injunction.

Both the Consolidated Complaint and the testimony of various named plaintiffs make clear that the primary relief sought in this case is specific performance -- namely, an order requiring defendants to permit cardholders "to accrue rebates into the indefinite future." (Deposition of Gerald Essig at 143 (attached at Tab 2); *see also* Compl., Prayer for Relief ¶ C (requesting order "[a]warding specific performance of the Rebate Program to plaintiffs and Class members").) The Supreme Court of the United States has long held that "[i]n actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation." *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 347 (1977). The value of the object of the litigation can be considered from either the plaintiff's or the defendant's viewpoint. *See Smith v. Adams*, 130 U.S. 167, 175 (1889) ("the pecuniary value of the matter in dispute may be

determined, not only by the money judgment prayed, where such is the case, but in some cases by the increased or diminished value of the property directly affected by the relief prayed, or by the pecuniary result to one of the parties immediately from the judgment"); *see also Tatum v. Laird*, 444 F.2d 947, 951 n.6 (D.C. Cir. 1971) (noting Supreme Court's adherence in *Flast v. Cohen*, 392 U.S. 83 (1968), to this "either viewpoint" rule), *rev'd on other grounds*, 408 U. S. 1 (1972).

The Ninth Circuit has faithfully followed this precedent, holding that in an action seeking equitable relief, courts determine the amount in controversy by reference to the "value of the 'thing sought to be accomplished by the action'" which "may relate to either or any party to the action." *Ridder Bros., Inc. v. Blethen*, 142 F.2d 395, 399 (9th Cir. 1944) (quoting *Smith*, 130 U.S. 175)); *see also Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 405 n.6 (9th Cir. 1996).

This Court's Order cites a number of cases addressing the subject of whether various categories of damages may be aggregated for purposes of satisfying the jurisdictional amount requirement. (*See* Order at 2.) The Ninth Circuit cases cited above set out a general rule that has nothing to do with aggregation: when a defendant will incur substantial costs in order to comply with a request for injunctive relief, that is the proper measure of the "value of the object of the litigation." There is nothing on the face of this rule that would exempt class actions. Admittedly, the Supreme Court's holding in *Snyder v. Harris*, 394 U.S. 332 (1969) -- that discrete individual claims of putative class members cannot be aggregated in determining the jurisdictional amount -- has raised questions about the extent to which this general rule applies in the context of putative class actions. Some federal courts have continued to apply the "either viewpoint" rule despite *Snyder*. *See, e.g., Committee for G.I. Rights v. Callaway*, 518 F.2d 466 (D.C. Cir. 1975); *Jacobson*

v. Ford Motor Co., No. 98 C 742 (slip op. at 5-7) (N.D. Ill. Sept. 30, 1999) (attached at Tab 3); *see also Justice v. Atchison, Topeka & Santa Fe Ry. Co.*, 927 F.2d 503 (10th Cir. 1991) (holding in multi-plaintiff case that it is proper to value injunction from defendant's viewpoint, and specifically noting that *Snyder* non-aggregation rule does not alter result). Other courts have suggested that, in some circumstances, valuing the costs of injunctive relief by considering the total detriment to a defendant is equivalent to an impermissible aggregation of class-based claims. *See, e.g., Packard v. Provident Nat'l Bank*, 994 F.2d 1039 (3d Cir. 1993).

The Court need not resolve this debate to find that federal jurisdiction exists in this case. *Snyder v. Harris* prevents only the aggregation of ***separate and distinct*** claims. Where, as here, the injunction sought does not involve the separate and distinct claims of any individual, but rather seeks to promote the common and undivided interest of the putative class, *Snyder* is not implicated, and *Ridder*, which adopts the defendant's-viewpoint rule, is the controlling precedent. *Cf. Snow v. Ford Motor Co.*, 561 F.2d 787 (9th Cir. 1977) (holding that defendant's viewpoint rule could not be used in case where requested injunction requiring defendant to include $11 wiring kit with all future sales could be allocated among individual plaintiffs and therefore was merely a method of enforcing numerous separate and distinct claims).

This distinction was recently given dispositive effect in *Loizon v. SMH Societe Suisse de Microelectronics*, 950 F. Supp. 250 (N.D. Ill. 1996). There, two consumers filed a purported class action alleging that the manufacturer and distributors of a watch had failed to disclose the radioactive contents of their product. The plaintiffs sought compensatory damages, an accounting, and an order requiring the defendants to inform all class members that the watch caused exposure to and absorption of excessive

radiation. *See id* at 252. The defendants removed the case, and the court then denied plaintiffs' motion to remand.

Citing *Snow*, the *Loizon* court expressly held that the "either viewpoint" test could not be used to avoid the non-aggregation principle of *Snyder*. The court concluded, however, that when the putative class has a common and undivided interest in the injunctive relief, the non-aggregation principle of *Snyder* does not apply. *See id.* at 253. According to the court, a finding that federal jurisdiction exists under such circumstances is entirely consistent with *Snyder*.

The court then determined that "only the class, and not individual class members, could request the injunctive relief" of an accounting and an order requiring the defendants to inform all class members that the watch caused exposure to and absorption of excessive radiation. *Id.* at 254 (citations omitted). Since compliance with the claim for injunctive relief would have required nationwide corrective advertising that would have cost well in excess of $50,000 (then the jurisdictional amount) regardless of the number of plaintiffs, the putative class (as opposed to individual putative class members) had a "common and undivided interest" that exceeded the jurisdictional minimum. Thus, "[h]aving established that plaintiffs have a common and undivided interest in the injunctive relief requested," the court concluded that the jurisdictional amount was satisfied by looking to "the defendant's cost of complying with the requested injunctive relief." *Id.* at 254. *Loizon's* holding, which was expressly predicated on the reasoning of both *Snyder* and *Snow*, should be applied in this case.[3]

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[3] Many other courts similarly have held that the cost of injunctive relief to the defendant is the proper method of valuing the amount in controversy in putative class actions where the relief requested is sought to vindicate a common and undivided right. *See, e.g., Hubbard v. General Motors Corp.*, No. 95 Civ. 4362, 1996 WL 274018, at *3 (S.D.N.Y. May 22, 1996) (attached at Tab 4) (putative class had "a

Under the "either viewpoint" rule, it is clear that this case satisfies the jurisdictional amount requirement. The cost to defendants of reinstating the Ford Rebate Program and permitting putative class members to "accrue rebates into the indefinite future" (or even to accrue rebates for just a few years) would be significantly in excess of $75,000. There are large fixed costs involved in operating a rebate program for millions of cardholders. Citibank estimates that the fixed costs (those that "would not depend on the extent of cardholder usage -- such as costs associated with maintaining the pertinent computer systems and software, maintaining customer service procedures and training") of operating a rebate program would far exceed $75,000 per year. (*See* Affidavit of Sheryl Behar (attached at Tab 6) Indeed, simply maintaining the rebate redemption center -- putting aside the costs of recreating an entire administrative apparatus that was dismantled almost two years ago -- would cost more than $75,000 ***per month*** (*see id.*, ¶ 7), regardless of the number of cardholders involved. Thus, the value of this litigation is clearly many times in excess of the $75,000 jurisdictional amount.

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common and undivided interest" in requested court order requiring corrective disclosures and corrective action with respect to an alleged brake defect); *Earnest v. General Motors Corp.*, 923 F. Supp. 1469, 1472 (N.D. Ala. 1996) ("equitable relief sought in this case [advertising and recall campaign] would benefit the putative class as a whole and not just any individual plaintiff"); *Gibbs v. E.I. DuPont de Nemours & Co.*, 876 F. Supp. 475, 479 (W.D.N.Y. 1995) (federal jurisdiction over a "court-supervised fund which would provide medical monitoring" to putative class); *Cahnmann v. Sprint Corp.*, 961 F. Supp. 1229, 1232 (N.D. Ill. 1997) (recognizing defendant's viewpoint as proper valuation method in earlier case where plaintiffs requested an injunction that would have required the defendant to re-program computers used to calculate escrow payments for thousands of consumers); *Tylka v. Gerber Prods. Co.*, Nos. 96 C 1647-49, 96 C 1964, 1996 WL 341441 at *2 (N.D. Ill. June 18, 1996) (attached at Tab 5) (applying defendant's viewpoint to conclude that federal jurisdiction existed in case where plaintiffs requested injunctive relief requiring national corrective advertising).

These are the types of costs to defendants that courts (including *Snyder* and *Snow*) have recognized as being indivisible because they do not arise from separate and distinct individual claims. This is relief that can only go to a class of plaintiffs ***as a class***, and therefore does not implicate the Ninth Circuit's rule against aggregation of individual claims in class actions. *See Loizon*, 950 F. Supp. at 251-54. Accordingly, the cost to defendants of complying with the injunctive relief requested by plaintiffs -- and shown through the named plaintiffs' testimony to be the primary avenue of relief at issue -- independently satisfies the jurisdictional amount requirement.

2. Plaintiffs' Pleadings Make Clear That Their Request For Monetary Relief Also Seeks To Vindicate A Common And Undivided Interest.

The jurisdictional amount requirement is also satisfied by plaintiffs' request for damages, inasmuch as the pleadings (including plaintiffs' Supplemental Memorandum In Support Of Class Certification ("Pls'. Supp. Mem.")) make clear that those damages are sought to vindicate a common and undivided interest purportedly shared by all class members.[4] In their briefs opposing plaintiffs' motion for class certification, defendants argued that there is no way for the Court to separate those putative class members who have suffered compensable damages (*e.g.*, those cardholders who would have used their Ford rebates to purchase a Ford vehicle if they had been permitted to accrue rebates for five years) from those putative class members with no damages. (*See, e.g.*, Defendants' Supplemental Memorandum In

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[4] Obviously, defendants vigorously contest both the substance of plaintiffs' claims and the theories advanced in support of their motion for class certification. This dispute is irrelevant to the present jurisdictional inquiry, however. Even if it eventually "appears that there will be no occasion for an award of damages, that fact does not deprive this court of jurisdiction." *Harding v. U.S. Figure Skating Assoc.*, 851 F. Supp. 1476, 1481 (D. Or. 1994).

Opposition to Class Certification at 13-15.) Plaintiffs' consistent response has been that they need not identify, much less seek to redress, any individual cardholder's particular legal damages allegedly flowing from the termination of the Ford Citibank Rebate Program. Instead, plaintiffs argue that the mere termination of the Ford Rebate Program, without any further individualized analysis, is a violation of consumer-protection and contract law. Plaintiffs therefore have stated that they seek "an aggregate award" of "class-wide damages" without reference to the damages incurred by any individual cardholder. (Pls'. Supp. Mem. at 12-13.) In short, because the amount of monetary damages requested by plaintiffs is unaffected by the presence or absence of any particular cardholder in this lawsuit, the interest being asserted on behalf of the class is a classic "common and undivided" interest.[5]

It is apparent from plaintiffs' complaint that the dollar amount in which plaintiffs assert an "aggregate" interest is more than sufficient to satisfy the jurisdictional amount requirement. Indeed, it is huge: according to the Consolidated Complaint, the monetary relief at issue in this litigation is ***$21 billion***. (Compl. ¶ 5.) This collective claim for such a tremendous amount not only places this case squarely within well-established law concerning "common and undivided" claims, but it also implicates the very concerns -- about case complexity, the sufficiency of judicial resources, and efficient dispute resolution -- that animated Congress in enacting the diversity jurisdiction statute in the

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[5] Plaintiffs' briefs and other pleadings are clearly a valid basis from which to infer facts relating to the jurisdictional analysis. *See, e.g., Lien v. H.ER.C. Prods., Inc.*, 8 F. Supp. 2d 531, 534-35 (E.D. Va. 1998) (denying motion to remand and relying on "the pleadings in this case and the settlement letter issued [by] plaintiff's counsel") (citing *Yarnevic v. Brink's, Inc.*, 102 F.3d 753, 755 (4th Cir. 1996) (noting that court reviewing existence of diversity jurisdiction may take into account all information, whether communicated in a "formal or informal manner")).

first place. *See* Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 Harv. L. Rev. 483 (1927-28). For this independent reason, diversity jurisdiction exists in this case.

B. PLAINTIFFS' REQUEST FOR PUNITIVE DAMAGES INDEPENDENTLY SATISFIES THE JURISDICTIONAL AMOUNT REQUIREMENT

This lawsuit is also subject to federal diversity jurisdiction because of plaintiffs' request for punitive damages. (*See* Compl., Prayer for Relief ¶ D.) In its Order, this Court quoted a California district court's statement in *Kanter v. Warner-Lambert Co.*, 52 F. Supp. 2d 1126, 1129-32 (N.D. Cal. 1999), that "[a]ggregation of punitive damages to meet the jurisdictional minimum is not permitted in this circuit." Respectfully, that is not an accurate statement of Ninth Circuit law. While it is true that a number of district courts in this circuit have rejected the idea that punitive damages may be aggregated to satisfy the jurisdictional amount requirement, decisions by both the Ninth Circuit and the Supreme Court make clear that those holdings are untenable.

In *In re Northern Dist. of Calif. Dalkon Shield IUD Prods. Liab. Litig.*, 526 F. Supp. 887 (N.D. Cal. 1981), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982), a California district court conditionally certified a case for class treatment and found that the case was subject to federal diversity jurisdiction because the punitive damages requested by plaintiffs could be aggregated for jurisdictional purposes. *Id.* at 910-11. On appeal, the Ninth Circuit -- pursuant to its obligation to satisfy itself *sua sponte* that jurisdiction existed -- specifically considered the district court's finding of jurisdiction. Rather than rejecting the district court's express holding aggregating the request for punitive damages, the Ninth Circuit accepted the district court's judgment concerning the existence of diversity jurisdiction and

remanded the case for further proceedings in federal court. *See* 693 F.2d at 849.

The Ninth Circuit recently revisited the question of diversity jurisdiction in *Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373 (9th Cir. 1997). In *Singer*, the court was required to decide upon the appropriate analytical framework for determining the amount in controversy in a diversity case. After considering various models for assessing the jurisdictional amount, the court stated that "[t]he Fifth Circuit has described an appropriate procedure for determining the amount in controversy on removal." *Id.* at 377 (citing *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326 (5th Cir. 1995)). *Allen*, the Fifth Circuit precedent adopted by the Ninth Circuit in *Singer*, stands for a single substantive proposition: that "the full amount of alleged [punitive] damages be counted against each plaintiff in determining the jurisdictional amount." *Allen*, 63 F.3d at 1333. The court in *Allen* reasoned that "[w]hile separate plaintiffs may seek an award in separate cases," the "purpose [of punitive awards] is to protect society by punishing and deterring wrongdoing." *Id.* Because an "individual's damages or harm is relevant only to assessing the defendant's wrongdoing," *id.*, the *Allen* court held that a class claim for punitive damages is a common and undivided claim for jurisdictional purposes. While the Ninth Circuit in *Singer* did not specifically consider the punitive damages question, the court's wholehearted embrace of *Allen* without any qualification shows unmistakably that punitive damages are to be considered in the aggregate for purposes of ascertaining the amount in controversy. On the adoption of *Allen* into Ninth Circuit law, the *Singer* court could not have been clearer: "We agree with the Fifth Circuit." *Singer*, 116 F.3d at 377.[6]

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[6] For a number of reasons, *Singer* is not a surprising case in this regard. For one thing, by the time *Singer* was decided, the Eleventh Circuit also had embraced *Allen* as the touchstone of its diversity jurisdiction analysis. *See Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1358 (11th Cir. 1996) (aggregating punitive damages to satisfy jurisdictional amount requirement). The *Allen* rule of aggregation is also consistent with the Supreme Court's decision in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), where a majority of the Supreme Court for the first time invalidated an award of punitive damages on the ground that the amount of the award was excessive. The strong implication of *Gore* is that defendants may not be subjected without limit to repeated suits seeking punitive damages, since there is a constitutional upper limit on the amount of such damages. (While this argument was urged by the petitioner in *Gore*, the Court declined to address the argument on grounds of waiver. *See Gore*, 517 U.S. at 613 n.4 (Ginsburg, J., dissenting).) In short, since the due-process limited adopted in *Gore* would operate to bar the "nth" cardholder from pursuing an individual claim for punitive damages, the *Gore* decision further shows that claims for punitive damages are "collective and undivided" for purposes of jurisdictional analysis.

In sum, defendants recognize that a number of district courts in this circuit have refused to aggregate requests for punitive damages to satisfy the jurisdictional amount requirement. Defendants respectfully submit that those decisions have misapplied (or perhaps failed to consider) controlling Ninth Circuit and Supreme Court precedent. Under *Dalkon Shield* and *Singer*, plaintiffs' request for punitive damages -- presumably some multiple of the alleged $21 billion in damages stated in the Consolidated Complaint -- is sufficient in itself to satisfy federal jurisdictional requirements.

III. CONCLUSION

For the foregoing reasons, defendants respectfully submit that this Court has federal diversity jurisdiction over the instant action.

DATED: October 21, 1999

Respectfully submitted,

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APPENDIX I

The Honorable William L. Dwyer

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE FORD MOTOR COMPANY CITIBANK (SOUTH DAKOTA), N.A. CARDHOLDER REBATE PROGRAM LITIGATION

MDL Docket No. 1199
C98-153WD
THIS DOCUMENT RELATES TO ALL CASES

DECLARATION OF SHERYL BEHAR IN SUPPORT OF DEFENDANTS' BRIEF IN RESPONSE TO ORDER TO SHOW CAUSE DATED OCTOBER 14, 1999

I, Sheryl Behar, hereby declare as follows:

1. I am a Vice President of Citicorp Credit Services, Inc. ("CCSI"). In my position as a Vice President of CCSI, I have knowledge of the administrative activities and costs associated with the Ford Rebate Program and other aspects of the Ford Rebate Program's operations.

2. On December 31, 1992, Citibank (South Dakota), N.A. ("Citibank") and Ford Motor Company ("Ford") entered into a contract (the "Ford-Citibank Contract") providing for a co-branded credit card and providing for a usage-incentive program (the "Ford Rebate Program"). Subject to the terms of the Ford-Citibank Contract, Citibank was the issuer of co-branded Ford-Citibank Mastercard and Visa credit cards ("Ford Citibank Cards"), and Ford provided cardholders with rebate credits, based on use of the Ford

Citibank Card, that were redeemable toward the purchase or lease of certain vehicles offered by Ford.

3. Citibank, through its affiliate CCSI and other affiliates, provided certain administrative services in connection with the Ford Rebate Program. The administrative services that Citibank provided for the Ford Rebate program included maintaining systems for calculating and keeping records of rebates awarded; maintaining customer information and related services concerning the award of rebates under the Ford Rebate Program; and maintaining the operation of a rebate redemption center that handled record keeping, customer rebate redemption communications, and other functions relating to the redemption of rebates.

4. If the Ford Rebate Program were required to be reinstated, Citibank would incur very substantial costs, far exceeding $75,000.

5. If the Ford Rebate Program were required to be reinstated, Citibank would be forced to incur additional costs of administering the rebate program in the future, including maintaining the redemption program superstructure for the period of reinstatement.

6. Maintaining the required operational superstructure entails large fixed costs and large variable costs for Citibank. The fixed costs that would not depend on the extent of cardholder usage -- such as costs associated with maintaining the pertinent computer systems and software, maintaining customer service procedures and training, and the like -- far exceed $75,000 for a single year of further operation.

7. As one example, operation of the Citibank rebate redemption center, by itself, required 30 employees and a substantial computer network during 1997 (the last year of the program). Citibank's annual costs of operating this rebate redemption center substantially exceeded $75,000 during that year and would exceed $75,000 for each

additional month that the Ford Rebate Program was required to be continued.

I declare under penalty of perjury that the foregoing is true and correct.

Dated October 20, 1999

/s/ Sheryl Behar
Sheryl Behar

APPENDIX J

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE FORD MOTOR COMPANY/CITIBANK (SOUTH DAKOTA), N.A. CARDHOLDER REBATE PROGRAM LITIGATION

No. MDL-1199
THIS DOCUMENT RELATES TO ALL CASES

[FILED: October 29, 2001]

ORDER OF DISMISSAL AND REMAND TO STATE COURT

I. INTRODUCTION

Six lawsuits were filed against defendants Ford Motor Company and Citibank (South Dakota), N.A., in courts of different states. Each complaint asserted solely state claims. The plaintiffs alleged that the defendants misrepresented or withheld information about the nature and duration of the Ford/Citibank cardholder rebate program and then wrongfully discontinued that program. The defendants removed each case to federal court on the basis of diversity jurisdiction. Between January 8, 1998, and June 12, 1998, the Judicial Panel on Multidistrict Litigation transferred the six cases to this court for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407. On August 5, 1998, plaintiffs filed a consolidated complaint meant to supersede the six original actions and purporting to sue on

behalf of a nationwide class that would comprise an estimated six million persons. The consolidated complaint asserts three claims, all based on state law (breach of contract, violation of state consumer protection statutes, and unjust enrichment), and pleads jurisdiction solely based on diversity of citizenship.

At the parties' mutual request, class certification and other proceedings were deferred for a period of time. Plaintiffs then moved for class certification and a hearing on the motion was held on July 29, 1999. During the hearing, plaintiffs requested additional discovery and supplemental briefing on the Rule 23 issues; the request was granted and the class action motion was renoted for October 7, 1999.

No motion for remand or challenge to the existence of diversity jurisdiction has been filed.[1] The defendants' supplemental brief opposing class certification, however, raised certain arguments that cast doubt on the existence of jurisdiction.[2] Recognizing that the court's duty is to inquire sua sponte into jurisdiction when appropriate, *see Rincon Band of Mission Indians v. County of San Diego*, 495 F.2d 1, 8 (9th Cir. 1974) citing *California v. LaRue*, 409 U.S. 109, 112-13 n.3 (1972)), the court issued a show cause order on October 14, 1999. In response, the plaintiffs make no arguments for diversity jurisdiction even though they pleaded

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1 A motion to remand one of the six cases, *Merrick v. Ford Motor Co.*, No. C98-153WD, was withdrawn before a decision was made.

2 *See* Defs.' Suppl. Mem. Opp'n Class Cert. (Dkt. # 113) at 14 ("This case, after all, does not involve a common fund or a joint interest among cardholders. Instead, it involves a collection of individual claims based on individual patterns of consumer purchasing decisions. The Ninth Circuit has made clear that aggregated damages may not be awarded in this type of case. . ."). *See also id.* at 4 ("As to both proposed classes, plaintiffs suggest a variety of aggregated damage-calculation methodologies, while ignoring the fact that claimant-specific jury trials are needed to determine which (if any) cardholders were 'damaged' in the first place.").

it in their consolidated complaint. "[T]he trend," they say, "suggests jurisdiction is questionable." Pls.' Resp. Order Show Cause ((Dkt. # 117) at 3. Defendants, on the other hand, argue that the requirements for diversity jurisdiction are met.

II. ANALYSIS

A. Legal Standard

A defendant may remove a case from state to federal court pursuant to 28 U.S.C. §§ 1441 and 1446. Removal jurisdiction is "strictly construed and federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance." *Duncan v. Stuetzle*, 76 F.3d 1480, 1485 (9th Cir. 1996) (quoting *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-9 (1941) and *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992)). Should the district court determine that it lacks subject matter jurisdiction over the removed case, the district court must remand it to state court. 28 U.S.C. § 1447. A transferee court conducting pretrial proceedings under 28 U.S.C. § 1407 has the power to enter an order to remand. *See* R.P.J.P.M.L. 7.6(a). *See also In re Ivy*, 901 F.2d (2d Cir. 1990). Where, as here, jurisdiction is asserted based on diversity of citizenship, there must be complete diversity between the class representatives and the defendants, and the "matter in controversy" must exceed $75,000. 28 U.S.C. § 1332(a). Here the parties are of diverse citizenship, and the question is whether the consolidated complaint places more than $75,000 in controversy. The defendants, as the parties asserting federal jurisdiction, have the burden of proving by a preponderance of the evidence that the jurisdictional amount requirement is met. *See McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936). Defendants do not content that the actual damages suffered by any one of the plaintiffs or putative class members exceeds $75,000. Instead they argue that (1) the plaintiffs' "common and

undivided" interest in compensatory damages; (2) the cost of complying with the requested injunctive relief; and (3) plaintiffs' request for punitive damages, each meets the $75,000 amount-in-controversy requirement of 28 U.S.C. § 1332(a).

There is consensus among courts but dispute among commentators as to whether to apply the law of the transferee district of the transferor district to multidistrict litigation proceedings. Here, the transferor courts were sited in the Second, Seventh, Ninth, and Eleventh Circuits. In a leading case on the subject, the District of Columbia Circuit held that "the law of a transferor forum on a federal question. . .merits close consideration, but does not have stare decisis effect in a transferee forum situated in another circuit." *In re Korean Airlines Disaster*, 829 F.2d 1171, 1176 (D.C. Cir. 1987), *aff'd on other grounds sub nom., Chan v. Korean Airlines Ltd.*, 490 U.S. 122 (1989). *But see* Robert A. Ragazzo, *Transfer and Choice of Federal Law: The Appellate Model*, 93 Mich. L. Rev. 703, 705-6 (1995) (arguing that the law of the transferor forum should be applied). While the case law suggests that the law of the Ninth Circuit should be applied, the court has also considered the laws of the transferor districts in determining what is "ultimately a single proper interpretation of federal law." *In re Korean Air Lines Disaster*, 829 F.2d at 1175.

B. The "Common Fund" Exception to the "Non-Aggregation" Rule

In meeting the jurisdictional minimum, the separate and distinct claims of plaintiffs and class members may not be aggregated. *See Snyder v. Harris*, 394 U.S. 332, 335-36 (1969). Instead, "[e]ach plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount." *Zahn v. International Paper Co.*, 414 U.S. 291, 301 (1973). Where, however, "several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest,"

their claims may be aggregated to reach the jurisdictional minimum. *Zahn*, 414 U.S. at 294 (quoting *Troy Bank v. G.A. Whitehead & Co.*, 222 U.S. 39, 40-41 (1911)). *See also* 14B Charles Alan Wright et al., Federal Practice and Procedure § 3704 (3d ed. 1998). The paradigmatic cases permitting the aggregation of claims "are those cases which involve a single indivisible res, such as an estate, a piece of property (the classic example), or an insurance policy. These are matters that cannot be adjudicated without implicating the rights of everyone involved with the res." *Gilman v. BHC Securities, Inc.*, 104 F.3d 1418, 1423 (2d Cir. 1997) (citation omitted). *See also Eagle v. AT&T Co.*, 769 F.2d 541, 546-47 (9th Cir. 1985); *Potrero Hill Community Action Comm. v. Housing Auth.*, 410 F.2d 974, 979 (Cir. 1969).

The plaintiffs here allege that the defendants misrepresented or withheld information about the cardholder rebate program and then wrongfully discontinued that program. No plaintiff or putative class member has a compensatory claim greater than $3,500. Defendants contend that the jurisdictional minimum is nonetheless met because plaintiffs have requested as damages an "'aggregate award' of 'class-wide damages' without reference to the damages incurred by any individual cardholder." Defs.' Resp. Order Show Cause (Dkt. # 119) at 8 (quoting Pls.' Suppl. Mem. Supp. Class Cert. (Dkt. #107) at 12-13). Defendants' argument focuses on the wrong issue: the "aggregate award" plaintiffs seek is a class action construct with no link to whether the plaintiffs shared a pre-litigation interest in the subject of the litigation. *See Gilman v. BHC Securities, Inc.*, 104 F.3d 1418, 1427 (2d Cir. 1997) ("Under the classic 'common fund' cases, what controls is the nature of the right asserted, not whether successful vindication of the right will lead to a single pool of money that will be allocated among the plaintiffs."). Each plaintiff's claim arises out of that plaintiff's contract with the defendants, each plaintiff may sue individually to recover from the defendants, and no plaintiff's claim implicates any other plaintiff's rights.

Thus, the monetary claims asserted are not a "common and undivided interest" to enforce a "single title or right" for purposes of meeting the jurisdictional minimum under 28 U.S.C. § 1332(a). *See Gilman*, 104 F.3d at 1428 ("these features of the case do not demonstrate a unitary claim; they merely reflect the problems of theory and proof in this case, and the named plaintiff's efforts to solve or plead around them"). The common fund exception to the non-aggregation principle is inapplicable, and thus, with respect to compensatory damages, defendants have not met their burden of proof concerning the amount in controversy.

C. Cost of Compliance with Injunctive Relief

Defendants next argue that the jurisdictional minimum is met because the cost to them of complying with the requested injunctive relief would be "significantly in excess of $75,000." Defs.' Resp. at 6. The injunctive relief sought by the plaintiffs is the "specific performance of the Rebate Program to plaintiffs and Class members." Cons. Compl. (Dkt. # 18) at 13. Defendants argue that plaintiffs have a "common and undivided interest," that the injunctive relief sought "can only go to class plaintiffs as a class," Defs.' Resp. at 7, and that therefore the non-aggregation rule of *Snyder* and *Zahn* is inapplicable.

This argument is based on testimony that "the fixed costs in operating a rebate program for millions of cardholders," which exceed $75,000 per year, "would not depend on the extent of cardholder usage." Defs.' Resp. at 6. The injunctive relief sought, however, is simply a means to vindicate each plaintiff's separate and individual claim for accrual of rebates for five years. Plaintiffs' having made class action allegations does not alter the nature of the rights asserted. Where, as here, the nature and value of the injunctive relief sought is identical to the nature and value of the monetary relief sought, to permit aggregation of the former but not the latter would undermine the principles of

Snyder and *Zahn*. *See Snow v. Ford Motor Co.*, 561 F.2d 787, 790-91 (9th Cir. 1977). Just as the compensatory claims may not be aggregated because the plaintiffs do not seek to enforce a common and undivided interest, the injunctive relief based on those same interests may not be aggregated.

The "either viewpoint" rule pressed by the defendants and espoused by some courts—that the amount in controversy may be determined by the "value of the thing sought to be accomplished by the action[, which] may relate to either or any party to the action," *Ridder Bros., Inc v. Blethen*, 142 F.2d 395, 399 (9th Cir. 1944)—does not alter the result. Defendants have failed to show that the cost to them of allowing one cardholder to accrue rebates for the full five-year period, the required analysis under the non-aggregation principle of *Snyder* and *Zahn*, would meet the jurisdictional minimum. Whether determined from the plaintiffs' or the defendants' viewpoint, the defendants have failed to show that the value of the injunction enforced as to any one cardholder would exceed $75,000.

D. Punitive Damages

Defendants also argue that the amount in controversy requirement has been met because of the plaintiffs' prayer for punitive damages. They do not contend that any plaintiff's recovery of punitive plus compensatory damages could reach $75,000 (at that level, a recovery for six million class members would be the absurd total of $450 billion); instead, they argue only that the claims should be aggregated. But, as with the requests for compensatory damages and injunctive relief, under *Snyder* and *Zahn* the total claimed as punitive damages may not be attributed to each individual plaintiff for purposes of satisfying the jurisdictional minimum. Defendants' argument rests heavily upon *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326 (5th Cir. 1995). There, the Fifth Circuit held that, under Mississippi law, "the full amount of alleged [punitive] damages [must] be counted against each

plaintiff in determining the jurisdictional amount." *Allen*, 63 F.3d at 1333. While the Eleventh Circuit has adopted the state-law based rationale of *Allen*, *see Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1359 (11th Cir. 1996), the other circuit courts to consider the issue have rejected the holding in *Allen*, *see Gilman v. BHC Securities, Inc.*, 104 F.3d 1418 (2d Cir. 1997); *Anthony v. Security Pac. Fin. Servs.*, 75 F.3d 311 (7th Cir. 1996), and the Fifth Circuit itself has stated that the result in *Allen* is peculiar to Mississippi law, *see Ard v. Transcon. Gas Pipe Line Corp.*, 138 F.3d 596, 602 (5th Cir. 1998).[3]

As with injunctive relief, to permit the aggregation of punitive damages, when actual damages could not be aggregated, "would eviscerate the holdings of *Snyder* and *Zahn* and would run counter to the strict construction of the amount-in-controversy requirement those cases mandate." *Gilman*, 104 F.3d at 1431. Punitive damages are not the sort of "common fund" allowing for the aggregation of damages.

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[3] Contrary to the defendants' arguments, the Ninth Circuit has not addressed this issue. The Ninth Circuit's silence on the issue of aggregation when it vacated *In re N. Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig.*, 526 F. Supp. 887 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), does not mean that it agreed with the district court that aggregation of punitive damages was correct. The district court had offered alternative theories for the existence of diversity jurisdiction. 526 F. Supp. at 910-11. It cannot be said on what basis (if any) the Ninth Circuit found the jurisdictional minimum to be met. Furthermore, the court's approval of *Allen* in *Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 377 (9th Cir. 1997) ("We agree with the Fifth Circuit."), in no way indicates an approval of *Allen*'s aggregation theory. *Singer* did not deal with aggregation of punitive damages, but instead involved whether and to what extent the court should look beyond the complaint and the removal petition to determine the amount in controversy. Because of the Ninth Circuit's holding in *Goldberg v. CPC Int'l. Inc.*, 678 F.2d 1365, 1367 (9th Cir. 1982), other courts have assumed that the Ninth Circuit would not permit aggregation of punitive damages. *See Ard v. Transcon. Gas Pipe Line Corp.*, 183 F.3d 596, 601 n.3 (5th Cir. 1998); *Haisch v. Allstate Ins. Co.*, 942 F. Supp. 1245, 1251 (D. Ariz. 1996).

One cardholder's ability to recover such damages against Ford or Citibank for the termination of the rebate program is not dependent on any other cardholder, and a recovery by one cardholder would not implicate the rights of any other cardholder. For example, a cardholder who opted out of the putative class could seek punitive damages without regard for the disposition of the class suit.

Even under the rationale espoused by the Fifth and Eleventh Circuits, the nature of the state laws at issue in this case do not support the aggregation of punitive damages. Both circuits have held that the determination of whether the plaintiffs' claims to punitive damages are common and undivided is driven by state law. *See Cohen v. Office Depot, Inc.*, 184 F.3d 1292, 1295 (11th Cir. 1999); *Ard v. Transcon. Gas Pipe Line Corp.*, 138 F.3d 596, 602 (5th Cir. 1998); *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1358-59 (11th Cir. 1996); *Allen*, 63 F.3d at 1333-34. On a motion for rehearing, the *Allen* court emphasized this point. *Allen v. R & H Oil & Gas Co.*, 70 F.3d 26, 26 (5th Cir. 1995) (per curiam) ("[T]he panel is of the unanimous view that the opinion in this case specifically reflects a result under the Mississippi law of punitive damages and is not to be construed as a comment on any similar case that might arise under the law of any other state."). *See also Ard*, 138 F.3d at 602 (in distinguishing *Allen*, noting the "peculiar nature of Mississippi law").

It is disputed which state's (or states') laws will apply to the claims of the plaintiffs. *See* Defs.' Supp. Mem. at 8 n.2. The plaintiffs now claim that the laws of New York or South Dakota will apply. Pls.' Supp. Memo. at 4. In a well-reasoned opinion, the Second Circuit rejected the aggregation of punitive damages under New York law. *Gilman v. BHC Securities, Inc.*, 104 F.3d 1418 (2d Cir. 1997). The court held that because a plaintiff cannot recover punitive damages under New York law unless he "asserts an underlying cause of action upon which a demand for punitive damages can be

grounded," punitive damages may be aggregated only where the underlying cause of action may be aggregated, i.e., represents a common and undivided interest. *Gilman*, 104 F.3d at 1431. South Dakota's law of punitive damages is the same in this respect as New York's. *See Schaffer v. Edward D. Jones & Co.*, 521 N.W.2d 921, 928 (S.D. 1994). Thus, even under *Allen* and *Tapscott*, the plaintiffs here do not have a common and undivided interest in the monetary damages or injunctive relief sought, and punitive damages may not be aggregated.

III. CONCLUSION

For the reasons stated, defendants have failed to show by a preponderance of the evidence that the amount in controversy requirement of 28 U.S.C. §1332 has been met. The court therefore lacks subject matter jurisdiction over the consolidated complaint and the six removed cases. The consolidated complaint is hereby dismissed for lack of jurisdiction, and the six cases originally filed in state court, and removed to federal court by the defendants, are now remanded to state court as follows:

Copeland v. Ford Motor Co., No. C98-81 7WD, to the Circuit Court of Tuscaloosa County, Alabama (No. CV-97-970);

Essig et al. v. Ford Motor Co., No. C98-152WD, to the Supreme Court of the State of New York, County of Suffolk (No. 97-18514);

Hornreich et ux. v. Ford Motor C. et al., No. C97-1293WD, to the Superior Court of Washington for King County (No. 97-2-16935-6SEA);

LaGrou v. Ford Motor Co. et al., No. C98-226WD, to the Superior Court of the State of California, County of Los Angeles (No. BC180583);

McCauley v. Ford Motor Co. et al., No. C98-151WD, to the Circuit Court of Cook County, Illinois (No. 97L08315); and

Merrick v. Ford Motor Co. et al., No. C98-153WD, to the Circuit Court for the State of Oregon, County of Multnomah (No. 9708-06079).

The clerk if directed to send copies of this order to all counsel of record.

Dated: October 29, 1999.

/s/
William L. Dwyer
United States District Judge

APPENDIX K

The Honorable William L. Dwyer

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

IN RE FORD MOTOR COMPANY/CITIBANK (SOUTH DAKOTA), N.A. CARDHOLDER REBATE PROGRAM LITIGATION

MDL-1199
THIS DOCUMENT RELATES TO ALL

Copeland v. Ford Motor Co., No. C98-81WD, to the Circuit Court of Tuscaloosa County, Alabama (No. CV-97-970);

Essig et al. V. Ford Motor Co., No. C98-152WD, to the Supreme Court of the State of New York, County of Suffolk (No. 97-18514);

Hornreich et ux v. Ford Motor Co. et al., (No. C97-2-16935-6SEA)

LaGrou v. Ford Motor Co. et al., No. C98-226WD, to the Superior Court of the State of California, County of Los Angeles (No. BC180583);

McCauley v. Ford Motor Co. et al., No. C98- 151 WD, to the Circuit Court of Cook County, Illinois (No. 97L08315);

Merrick v. Ford Motor Co. et al., No. C98- 153WD, to the Circuit Court for the State of Oregon, County of Multnomah (No. 9708-06079).

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT BY DEFENDANT FORD MOTOR COMPANY

Ford Motor Company, defendant herein, appeals to the United States Court of Appeals for the Ninth Circuit from the Order of Dismissal and Remand to State Court entered in this case on October 29, 1999.

DATED this 4th day of November, 1999.

MERRICK, HOFSTEDT & LINDSEY, P.S.

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APPENDIX L

THE HONORABLE WILLIAM L. DWYER

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

IN RE FORD MOTOR COMPANY / CITIBANK (SOUTH DAKOTA), N.A. CARDHOLDER REBATE PROGRAM LITIGATION

MDL Docket No. 1199
No. C98-153WD
THIS DOCUMENT RELATES TO ALL CASES
[FILED: Nov. 24, 1999]

NOTICE OF APPEAL

Notice is hereby given that Citibank (South Dakota), N.A., defendant in the above named case, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order of Dismissal and Remand to State Court entered in this action on the 29th day of October, 1999.

DATED this 24th day of November, 1999.

Respectfully submitted,

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APPENDIX M

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: FORD MOTOR COMPANY/CITIBANK (SOUTH DAKOTA), N.A., Cardholder Rebate Program Litigation

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JOHN B. MCCAULEY *et al.*,
Plaintiffs-Appellees,

v.

FORD MOTOR COMPANY, *et al.*,
Defendants.

Nos. 99-36115, 99-36206
(Consolidated)

[Filed Sept. 6, 2001]

[Reported at 264 F.3d 952]

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Appeal from the Decision of the United States District Court for the Western District of Washington; William L. Dwyer, District Judge, Presiding. D.C. Nos. MD-98-01199-WLD, CV-97-01293-WLD, CV-98-00151-WLD, CV-98-00152- WLD, CV-98-00153-WLD, CV-98-00226-WLD.

Before: BROWNING, WALLACE, and T.G. NELSON, Circuit Judges.

WALLACE, Circuit Judge:

Ford Motor Company (Ford) and Citibank (South Dakota), N.A. (Citibank) appeal from the district court's order dismissing the consolidated complaint of several underlying state court lawsuits under 28 U.S.C. § 1332 for lack of subject matter jurisdiction, and remanding these state suits to the courts from which they were removed. We must decide two questions. First, whether the minimum amount in controversy required to maintain a diversity suit in federal court ($75,000) is present in the consolidated action. We have jurisdiction under 28 U.S.C. § 1291 to review the district court's order dismissing the consolidated complaint for lack of subject matter jurisdiction, and we affirm. Second, we must determine whether we have jurisdiction to entertain a challenge to the district court's order remanding the original actions to the state court from which they came. We do not.

I

In early 1993, Ford and Citibank issued a co-branded Ford/Citibank credit card that offered cardholders the

opportunity to save on the purchase or lease of a new Ford vehicle through a usage-incentive program. Under the program cardholders earned a 5% rebate on each purchase made using the Ford/Citibank credit card and could accrue a maximum of $700 in rebates per year (representing $14,000 in purchases) over a five-year period, for a maximum possible rebate of $3,500, redeemable toward the purchase or lease of certain Ford vehicles. On December 31, 1997--less than five years after the program's inception--Ford and Citibank terminated the rebate accrual feature of the Ford/Citibank credit card.

Six state actions were filed in Washington, Oregon, California, Illinois, Alabama, and New York, alleging generally that Ford and Citibank misrepresented or withheld information about the nature and duration of the rebate program and wrongfully discontinued it. Ford and Citibank removed each case to federal district court on the basis of diversity jurisdiction, then petitioned the Judicial Panel on Multidistrict Litigation (Panel) to consolidate **[956]** and transfer the cases to a single district court for pre-trial proceedings, pursuant to 28 U.S.C. § 1407. "Under 28 U.S.C. § 1407, [the Panel] is authorized to transfer civil actions pending in more than one district involving one or more common questions of fact to any district court for coordinated or consolidated pretrial proceedings upon its determination that transfer 'will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions.' " Fed. Judicial Ctr., Moore's Federal Practice Manual for Complex Civil Litigation § 31.13 (3d ed.2000).

On January 8, 1998, and June 12, 1998, the Panel transferred the six removed actions to the Western District of Washington "for coordinated or consolidated pretrial proceedings." The transferee district court consolidated the cases on July 16, 1998, and a consolidated complaint was filed on August 5, 1998. Purporting to sue on behalf of a

nationwide class of six million Ford/Citibank cardholders, the consolidated plaintiffs alleged state law causes of action for breach of contract, unjust enrichment and consumer fraud, and plead diversity jurisdiction under 28 U.S.C. § 1332(a). The consolidated plaintiffs sought relief in the form of specific performance, disgorgement, and compensatory and punitive damages.

After transfer and consolidation, Ford and Citibank moved to dismiss the consolidated complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), and the district court denied the motion. The consolidated plaintiffs moved for class certification. However, after discovery was completed and the issue had been fully briefed by the parties, the district court deferred judgment on class certification and instead issued an order to show cause why "the consolidated action ... should not be dismissed for lack of jurisdiction, and why [the six underlying actions] should not be ... remanded to state court." Though neither party had challenged the district court's jurisdiction at any point in the proceedings, the district judge properly raised sua sponte the issue of whether the consolidated complaint alleged more than $75,000 in controversy under 28 U.S.C. § 1332(a).

Ford and Citibank filed a memorandum in support of jurisdiction, raising three reasons why the amount in controversy requirement was met: (1) the cost of compliance with the request for injunctive relief would exceed $75,000; (2) the consolidated plaintiffs have a common and undivided interest in their compensatory damages claim, which exceeds $75,000; and (3) the consolidated plaintiffs have a common and undivided interest in their punitive damages claim, which exceeds $75,000.

In an order dated October 29, 1999, the district court held that it "lack[ed] subject matter jurisdiction over the consolidated complaint and the six removed cases." The district court dismissed the consolidated complaint for lack of

jurisdiction and remanded the underlying actions to the several state courts of origin.

Pursuant to the Panel's rules of procedure, *see* R.P.J.P.M.L. 7.6(a), the district court sent a copy of the order to the Panel on November 8, 1999. In the attached letter, the district judge explained:

> [T]his order dismisses, for lack of subject matter jurisdiction, a consolidated complaint filed by the plaintiffs in this court. The dismissal of the consolidated complaint necessitated a disposition of the six original actions filed in state court, removed to federal court on the basis of diversity of citizenship, and transferred by the Panel to the [Western District of Washington] for coordinated or consolidated pretrial proceedings. For lack of subject matter **[957]** jurisdiction, the order remands those cases to state court.

Ford and Citibank timely appealed, challenging both the district court's dismissal of the consolidated complaint and its remand of the underlying actions.

II

We must first consider whether we have jurisdiction to review the district court's order which states "[t]he consolidated complaint is hereby dismissed for lack of jurisdiction." Because the district court's dismissed the "complaint" rather than the "action," the question arises whether the order is final and appealable. "Ordinarily an order dismissing a complaint but not dismissing the action is not appealable under section 1291 unless circumstances make it clear that the court concluded that the action could not be saved by any amendment of the complaint." *Hoohuli v. Ariyoshi*, 741 F.2d 1169, 1171 n. 1 (9th Cir. 1984). However, "[i]f it appears that the district court intended the dismissal to dispose of the action, it may be considered final and appealable." *Id.* (emphasis added).

Here, the record clearly indicates that the district court intended to dispose of the consolidated action. First, the dismissal did not grant leave to amend. *See id.*; *see also Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511, 1514 (9th Cir. 1987) ("Failure to allow leave to amend supports an inference that the district court intended to make the order final."). We are also aided by the district court's contemporaneous letter to the Panel which demonstrates a clear intention to terminate the case. The district court expressly sent the letter "[i]n compliance with R.P.J.P.M.L. 7.6(a)," which provides that "[a]ctions terminated in the transferee district court by valid judgment ... shall not be remanded by the Panel and shall be dismissed by the transferee district court. The clerk of the transferee court shall send a copy of the order terminating the action to the Clerk of the Panel...." (Emphasis added).

Although a specific dismissal of the action would have been preferable, we conclude in this case that we have jurisdiction to review the dismissal order under 28 U.S.C. § 291.

III

We review de novo a district court's dismissal for lack of subject matter jurisdiction. *Brady v. United States*, 211 F.3d 499, 502 (9th Cir. 2000). The party asserting federal jurisdiction bears the burden of proving the case is properly in federal court. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189, 56 S. Ct. 780, 80 L. Ed. 1135 (1936). Here, diverse citizenship is uncontested. Thus, the sole jurisdictional question is whether the minimum amount in controversy required to maintain a diversity suit in federal court is present. As the parties asserting diversity jurisdiction, Ford and Citibank bear the burden of establishing by a preponderance of the evidence that the amount in controversy exceeds $75,000. *See Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 404 (9th Cir. 1996).

On appeal, Ford and Citibank do not contend that any plaintiff has an individual damages claim exceeding $75,000. Nor do they contend that the individual plaintiffs' damages claims may be aggregated to satisfy the jurisdictional amount requirement. It is undisputed on appeal that the individual plaintiffs do not have a common and undivided interest in a claim for damages.

However, compensatory damages are not the only form of relief sought. The consolidated plaintiffs also seek injunctive relief, disgorgement, and punitive damages. **[958]** Ford and Citibank contend that each of these claims provides the requisite jurisdictional amount.

A.

Ford and Citibank first argue that their cost of compliance with the request for injunctive relief carries this case over the jurisdictional amount threshold. Relying upon our decision in *Sanchez*, 102 F.3d at 405, they contend that the amount in controversy requirement is satisfied if either party can gain or lose the jurisdictional amount (the so-called "either viewpoint" rule). Here, the consolidated plaintiffs seek specific performance of the rebate program, and Ford and Citibank submit that it will cost them more than $75,000 to reinstate and administer the rebate accrual feature of the Ford/Citibank credit card.

Under the "either viewpoint" rule, the test for determining the amount in controversy is the pecuniary result to either party which the judgment would directly produce. *See Ridder Bros. Inc. v. Blethen*, 142 F.2d 395, 399 (9th Cir. 1944) (holding that for purposes of calculating amount in controversy, "[t]he value of the thing sought to be accomplished by the action may relate to either or any party to the action") (internal quotation omitted). In other words, where the value of a plaintiff's potential recovery (in this case, a maximum of $3,500) is below the jurisdictional amount, but the potential cost to the defendant of complying with the injunction exceeds that amount, it is the latter that

represents the amount in controversy for jurisdictional purposes.

In *Sanchez*, we observed en banc that "*Ridder* ... rejected the 'plaintiff-viewpoint' rule, which states that courts attempting to determine the value of a claim for purposes of the amount in controversy requirement should look only to the benefit to the plaintiff, rather than to the potential loss to the defendant." 102 F.3d at 405 n. 6. *Ridder* stated that in suits involving equitable relief, "if the value of the thing to be accomplished [is] equal to the dollar minimum of the jurisdictional amount requirement to anyone concerned in the action, then jurisdiction [is] satisfied." 142 F.2d at 398. We did not apply *Ridder* in *Sanchez*, however, because the party with the burden of proof failed to provide any evidence to determine the extent of the loss that it would incur by an injunction.

But *Ridder* and *Sanchez* are single-plaintiff cases. Here, there are multiple plaintiffs seeking to sue on behalf of a putative class of six million individuals. We have specifically declined to extend the "either viewpoint rule" to class action suits. *See Snow v. Ford Motor Co.*, 561 F.2d 787, 790 (9th Cir. 1977). This limitation on the rule should apply regardless of whether the requested class has been certified. Indeed, logic would dictate that it should apply to all multi-party complaints. While "[i]t may seem paradoxical to [decline jurisdiction] in the multiplaintiff setting," where the potential loss to defendants typically is well beyond the jurisdictional amount threshold, "it is implicit in the rule that forbids aggregation of class members' separate claims that it will sometimes be more difficult for a [party asserting federal jurisdiction] to establish the minimum amount of controversy in a multiplaintiff case than in a much smaller single-plaintiff case." *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 609 (7th Cir. 1997).

In *Snow*, we acknowledged the inherent conflict between the "either viewpoint" rule and the non-aggregation rule

when calculating the amount in controversy in class action suits seeking equitable relief, and determined that the former must [959] yield. *Snow*, 561 F.2d at 788-91. In light of the Supreme Court's decisions in *Snyder v. Harris*, 394 U.S. 332, 89 S. Ct. 1053, 22 L. Ed. 2d 319 (1969) and *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S. Ct. 505, 38 L. Ed. 2d 511 (1973), prohibiting aggregation, we declined to apply *Ridder* in a class action suit seeking damages and injunctive relief, stating that "[in class actions,] the threshold question is aggregation, and it must be resolved affirmatively before total detriment [to the defendant] can be considered." *Id.* at 790. Otherwise, the principle of *Snyder* and *Zahn* would be subverted, i.e., plaintiffs with minimal damages could dodge the non- aggregation rule by praying for an injunction. *See id.* at 791. We recognized that " '[t]otal detriment' is basically the same thing as aggregation," and held that "where the equitable relief sought is but a means through which the individual claims may be satisfied, the ban on aggregation applies with equal force to the equitable as well as the monetary relief." *Id.* at 790 (internal quotation omitted).

Thus, under *Snow*, "the proper focus [in multiple plaintiff cases] is not influenced by the type of relief requested, but rather ... depend[s] upon the nature and value of the right asserted." *Id.* Put differently, "[w]hatever the form of relief sought, each plaintiff's claim must be held separate from each other plaintiff's claim from both the plaintiff's and the defendant's standpoint. The defendant in such a case is deemed to face multiple claims for injunctive relief, each of which must be separately evaluated." *Brand Name*, 123 F.3d at 610, citing *Snow*, 561 F.2d at 790. The question then becomes whether each plaintiff is asserting an individual right or, rather, together the plaintiffs "unite to enforce a single title or right in which they have a common and undivided interest." *Snyder*, 394 U.S. at 335, 89 S. Ct. 1053. If it is the latter, we may then look to the "either viewpoint" rule to determine jurisdiction. If it is the former,

the test is the cost to the defendants of an injunction running in favor of one plaintiff. *See Brand Name*, 123 F.3d at 610.

In an effort to carry this case across the amount in controversy threshold in the face of *Snow*, *Ford* and *Citibank* first contend that the consolidated plaintiffs have a "common and undivided interest" in the injunctive relief they seek, and compliance will cost substantially more than $75,000. Second, they aver that it will cost them more than $75,000 to reinstate and administer the rebate accrual program whether it is done for one plaintiff or six million. Thus, they allege that the "either viewpoint" rule may be applied in this case without running afoul of the non-aggregation principle of *Snyder* and *Zahn*.

1.

Turning to the first point, we are helped to understand the meaning of "common and undivided interest" by *Gilman v. BHC Sec., Inc.*, 104 F.3d 1418, 1423 (2d Cir. 1997), where the court explained that "the 'paradigm cases' allowing aggregation of claims 'are those which involve a single indivisible res, such as an estate, a piece of property (the classic example), or an insurance policy. These are matters that cannot be adjudicated without implicating the rights of everyone involved with the res.' " *Id.* (citation omitted). That does not fit the case before us in which the claims arising out of the termination of the rebate program do not implicate a "single indivisible res," and could be adjudicated on an individual basis because the consolidated plaintiffs (and putative class members) have no common and undivided interest in accruing rebates under the program. Each plaintiff charged purchases and accrued rebates individually, not as a group. **[960]** Thus, prior to litigation, they shared no common interest. As Ford and Citibank correctly stated in their memorandum opposing class certification, "[t]his case, after all, does not involve a common fund or a joint interest among cardholders. Instead, it involves a collection of individual claims based on

individual patterns of consumer purchasing decisions." They concluded that "[b]ecause the [putative] class members in this case do not in any sense possess joint ownership of, or an undivided interest in a common res, their claims ... are separate and distinct." *Id.* at 1424.

In spite of this earlier concession, Ford and Citibank now urge us to adopt *Loizon v. SMH Societe Suisse de Microelectronics*, 950 F. Supp. 250 (N.D. Ill. 1996), and hold that the putative class members have a "common and undivided" interest in the "opportunity to accrue rebates" because the injunctive relief requested--reinstating the rebate accrual program-- necessarily would benefit the putative class as a whole. There, plaintiffs sought injunctive relief, requiring the defendants to notify all putative class members of the potential dangers of wearing a line of watches manufactured by the defendants that contained a radioactive isotope. *Id.* at 252-53. The court found that the injunctive relief requested--corrective advertising--would benefit the class as a whole and, thus, held that the putative class members had a "common and undivided interest" because "only the class, and not individual class members, could request the injunctive relief." *Id.* at 254.

We are foreclosed from adopting *Loizon* because our decision in *Snow* tells us that "the proper focus ... is not ... the type of relief requested, but rather ... the nature and value of the right asserted." 561 F.2d at 790. Here, the consolidated plaintiffs assert the right to accrue rebates under the canceled program. That right is distinct to each plaintiff, is based on his or her individual contractual relationship with Ford and Citibank, and is worth no more than $3,500. "The fact that the plaintiff[s] seek [specific performance] does not through shear [sic] alchemy transform a cause of action which will provide marginal benefits ... into a claim that meets the ... amount in controversy requirement." *Smiley v. Citibank*, 863 F. Supp. 1156, 1164 (C.D. Cal. 1993), relying on *Snow*, 561 F.2d at 791. As we held earlier, to hold otherwise would

permit plaintiffs to circumvent the non-aggregation rule simply by seeking equitable relief.

Therefore, we hold that the consolidated plaintiffs in this case have not "unite[d] to enforce a single title or right in which they have a common and undivided interest." *Snyder*, 394 U.S. at 335, 89 S. Ct. 1053. "[T]he equitable relief sought [in this case] is but a means through which the individual claims may be satisfied," *Snow*, 561 F.2d at 790, and no plaintiff has an individual claim worth more than $75,000.

2.

The second effort to overcome *Snow* is the argument that because the cost of an injunction running in favor of one plaintiff would exceed $75,000, aggregating the cost of compliance is unnecessary to satisfy the amount in controversy requirement. In other words, while the monetary benefit to an individual plaintiff of reinstating the rebate accrual program would be relatively insubstantial, the fixed costs to Ford and Citibank of reinstating and maintaining the program would be the same whether it is done for one plaintiff or for six million. Thus, Ford and Citibank assert that because the non-aggregation rule would not be violated if their fixed administrative costs were used to establish the amount in controversy requirement, we may look to **[961]** the "either viewpoint" rule to establish the jurisdictional amount.

At first blush, this argument appears consistent with *Snow*. However, it is fundamentally violative of the principle underlying the jurisdictional amount requirement--to keep small diversity suits out of federal court. If the argument were accepted, and the administrative costs of complying with an injunction were permitted to count as the amount in controversy, "then every case, however trivial, against a large company would cross the threshold." *Brand Name*, 123 F.3d at 610. "It would be an invitation to file state-law nuisance suits in federal court." *Id.* Therefore, we hold that the amount in controversy requirement cannot be satisfied by

showing that the fixed administrative costs of compliance exceed $75,000.

B.

Next, the defendants contend that the consolidated plaintiffs' unjust enrichment claim, which seeks disgorgement of "billions of dollars" of "ill-gotten benefit[s]," satisfies the amount in controversy requirement. Relying upon *Aetna U.S. Healthcare, Inc. v. Hoechst Aktiengesellschaft*, 48 F. Supp. 2d 37 (D.D.C. 1999), Ford and Citibank argue that "the plaintiff class has a collective right to a disgorgement in the amount of the unjust enrichment." *Id.* at 41. Several district courts have held that a claim for disgorgement falls within the "common and undivided interest" exception to the non-aggregation rule. *See, e.g.*, *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 720 (D. Md. 2001); *In re Cardizem CD Antitrust Litig.*, 90 F. Supp. 2d 819, 828-29 (E.D. Mich. 1999); *Aetna*, 48 F. Supp. 2d at 41; *but see*, *Arnold v. General Motors Corp.*, 1998 WL 827726 at *2 (N.D. Cal. Nov. 18, 1998), relying on *Snow*, 561 F.2d at 790. These cases "rest their holdings upon the premise that disgorgement is a form of relief separate from, and independent of, individual damage recovery and that disgorgement 'would inure to the benefit of the class rather than vindicate any alleged violations of individual rights.'" *Microsoft*, 127 F. Supp. 2d at 720, quoting *Aetna*, 48 F. Supp. 2d at 41.

The Second Circuit rejected this argument, emphasizing that "what controls is the nature of the right asserted, not whether successful vindication of the right will lead to a single pool of money that will be allocated among the plaintiffs." *Gilman*, 104 F.3d at 1427. The court held that, despite its cloak of collectiveness, the plaintiffs' disgorgement claim was not aggregable for jurisdictional purposes because "[t]he claim remains one on behalf of separate individuals for the damage suffered by each due to the alleged conduct of defendant." *Id.* (internal quotation

omitted). That is, simply because the plaintiffs request disgorgement of "all benefits" does not establish that the right which they seek to enforce is collective.

We agree with the Second Circuit. We point out that this position is consistent with our decision in *Snow*, where, as explained previously, we held that the proper focus in determining whether class action claims may be aggregated is not the type of relief requested, but rather the nature and value of the right asserted. 561 F.2d at 790. In the disgorgement context, the germane question becomes whether "the plaintiffs' claims are consistent with a demand for damages based on their individual transactions with [the defendants]." *Gilman*, 104 F.3d at 1425 n. 8.

Applying this to the case before us is not difficult. The "ill-gotten benefit" alleged in the consolidated plaintiffs' unjust enrichment claim is comprised of: (1) the "profit[s] from ... interest charges and **[962]** intercharge fees [Ford and Citibank] collected as a result of the billions of dollar[s] class members, including plaintiffs, charged on their Ford Citibank Cards," which they would not have used but for the canceled rebate accrual feature; and (2) the "expiration of billions of dollars in rebates earned by plaintiffs and class members." The complaint thus demonstrates that the consolidated plaintiffs have no common and undivided interest in the disgorgement of the alleged ill-gotten benefits. They charged purchases and accrued rebates individually, not as a group. Thus, prior to litigation, they shared no common interest. Each cardholder could have brought a separate and individual action to recover the alleged benefits. Thus, "[t]he claim remains one on behalf of separate individuals for the damage suffered by each due to the alleged conduct of the defendant[s]." *Id.* at 1427.

In seeking disgorgement, the consolidated plaintiffs do not unite to enforce a "single title or right in which they have a common and undivided interest." *Snyder*, 394 U.S. at 335, 89 S. Ct. 1053. Therefore, the total disgorgement amount

requested cannot be used to satisfy the jurisdictional amount requirement.

C.

Finally, Ford and Citibank argue that the claim for punitive damages satisfies the jurisdictional amount requirement because the punitive damages sought in this case are a single collective right in which plaintiffs have a common and undivided interest. In support of their argument, they rely on the Fifth and Eleventh Circuit's decisions in *Allen v. R & H Oil and Gas Co.*, 63 F.3d 1326 (5th Cir. 1995), and *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353 (11th Cir. 1996), and our decision in *In re N. Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982).

First, *Allen* and *Tapscott*, which held that punitive damages may be aggregated in class suits, have been disavowed by their respective circuits. *See H&D Tire and Auto. Hardware, Inc. v. Pitney Bowes, Inc.*, 227 F.3d 326, 329-30 (5th Cir. 2000) (holding that *Allen* is not valid precedent because it conflicts with an earlier and, thus, controlling, pre-Fifth Circuit split opinion barring aggregation of punitive damages to establish diversity jurisdiction); *Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1073-77 (11th Cir. 2000) (holding that *Tapscott* is not valid precedent for same reason).

Second, the defendants contend that in *Dalkon Shield*, we "implicitly [held] that punitive damages may be aggregated for [jurisdictional] purpose[s]." They are wrong. In *Dalkon Shield*, we vacated the district court's class certification order but were silent on the issue of subject matter jurisdiction. The district court in *Dalkon Shield* had held that it had jurisdiction because, "[i]n the face of plaintiffs' allegations concerning punitive damages, [the] court cannot say to a legal certainty that the total award will not yield more than [the jurisdictional amount] to each successful claimant." *In re N. Dist. of Cal. Dalkon Shield*

IUD Prods. Liab. Litig., 526 F. Supp. 887, 910 (N.D. Cal. 1981). The district court went on to state that "[t]he claims before this court for an award of punitive damages also satisfy the jurisdictional amount requirement ... [because] the plaintiffs ... have a common and undivided interest in the recovery of punitive damages against the corporate defendant." *Id.* at 910-911. Because the district court's jurisdictional determination was disjunctive, our silence on the issue cannot be read as an implicit endorsement of the latter ground.

[963] Therefore, because we have not squarely addressed the issue, the question of whether punitive damages may be attributed *in toto* to each member of a putative class is a matter of first impression in this circuit. After the Fifth and Eleventh Circuit's retractions of *Allen* and Tapscott, all of the circuits that have considered the question now have answered in the negative. *See Martin v. Franklin Capital Corp.*, 251 F.3d 1284, 1292 (10th Cir. 2001); *Smith v. GTE Corp.*, 236 F.3d 1292, 1301 (11th Cir. 2001); *Pitney Bowes, Inc.*, 227 F.3d 326, 329-30 (5th Cir. 2000); *Brand Name*, 123 F.3d at 608-09 (7th Cir.); *Gilman*, 104 F.3d at 1431 (2nd Cir.). This view squares with our analogous jurisdictional amount decisions. *See Snow*, 561 F.2d at 790 (holding that the equitable relief sought by a class may not be aggregated where each class member's claim is separate and distinct); *Goldberg v. CPC International, Inc.*, 678 F.2d 1365, 1367 (9th Cir. 1982) (holding that attorneys' fees sought by class members cannot be aggregated for purposes of determining the amount in controversy).

Our analysis is substantially similar to our discussion of the disgorgement remedy, and the focus remains, as it must in light of *Snyder* and *Zahn*, on whether the consolidated plaintiffs and putative class members unite to assert a single title or right. Though the consolidated plaintiffs and putative class members in this case

> may indeed share an interest in receiving [punitive] damages ... that has nothing to do with whether--prior to litigation--they jointly held a single title or right in which each possessed a common and undivided interest. It is irrelevant whether successful vindication of claims would create a single pool of recovery to be allocated among multiple plaintiffs; a common interest in a pool of funds is not the type of interest that permits aggregation of claims under the "common fund" doctrine.

Gilman, 104 F.3d at 1430. Or, as the Seventh Circuit stated in *Brand Name*, "the right to punitive damages is a right of the individual plaintiff, rather than a collective entitlement of the victim's of the defendant's misconduct" because "[a] plaintiff's award of punitive damages is not limited by awards made to previous plaintiffs complaining of the same act of the defendant." 123 F.3d at 608-09; *see also*, *Allen*, 63 F.3d at 1334. Each consolidated plaintiff and class member could bring an individual action for punitive damages and have his or her rights adjudicated without implicating the rights of every other person claiming such damages. *See Gilman*, 104 F.3d at 1430. "Claims for punitive damages, like claims for compensatory damages, are brought together in a class action for the convenience of the plaintiffs," not because the plaintiffs share a common and undivided interest in a single, indivisible res. *See id.*

We join our sister circuits and hold that "punitive damages asserted on behalf of a [putative] class may not be aggregated for jurisdictional purposes where, as here, the underlying cause of action asserted on behalf of the class is *not* based upon a title or right in which the plaintiffs share, and as to which they claim, a common interest." *Gilman*, 104 F.3d at 1431. "To hold otherwise ... would eviscerate the holdings of *Snyder* and *Zahn* and would run counter to the strict construction of the amount-in-controversy requirement those cases mandate." *Id.*

For the foregoing reasons, we hold that Ford and Citibank have not met their burden of establishing that the jurisdictional amount in this case exceeds $75,000. The district court properly dismissed the consolidated **[964]** complaint for lack of subject matter jurisdiction.

IV

Last, Ford and Citibank contend that the district court erred w[illegible]n, after dismissing the consolidated complaint for lack of jurisdiction, it remanded the six underlying actions to their respective state courts of origin. They argue that the district court's dismissal of the consolidated complaint simultaneously terminated the underlying actions because the consolidated complaint superseded all previous complaints filed by the plaintiffs, rendering them "non-existent." Thus, the defendants assert that dismissing the consolidated complaint left the district court with nothing to remand and no authority to "revive" the underlying actions.

We first test our own jurisdiction: is the district court's remand order subject to our review? 28 U.S.C. § 1447(d) generally forbids appellate review of remand orders: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." However, the Supreme Court has interpreted section 1447(d) to prohibit "only remand orders issued under § 1447(c)." *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 346, 96 S. Ct. 584, 46 L. Ed. 2d 542 (1976) (abrogated on other grounds by *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 116 S. Ct. 1712, 135 L. Ed. 2d 1 (1996)). That is, remand orders based upon any defect in removal or lack of subject matter jurisdiction are immune from review. *See* 28 U.S.C. § 1447(c); *Thermtron*, 423 U.S. at 351, 96 S. Ct. 584.

Here, the district court specifically held that it "lack[ed] subject matter jurisdiction over the consolidated complaint *and* the six removed cases" because Ford and Citibank failed to satisfy the jurisdictional amount requirement of 28 U.S.C. § 1332(a). (Emphasis added). Therefore, it dismissed the

consolidated complaint and, pursuant to section 1447, remanded the six underlying actions to state court. Thus, it would appear clear that we are prohibited from reviewing the district court's remand order under section 1447(d).

However, Ford and Citibank argue that the remand order is not immune from our review because the district court did not, in fact, base its decision to remand on a lack of jurisdiction. *See Thermtron*, 423 U.S. at 350, 96 S. Ct. 584 (holding that the prohibition against review does not extend to remand orders entered on grounds not provided by section 1447). They contend that the district court's letter to the Panel "made clear that the remand component of its order was occasioned by docket-management considerations rather than by any jurisdictional finding." This is simply wrong. The letter expressly stated that "for *lack of subject matter jurisdiction*, the order remands [the underlying] cases to state court." (Emphasis added) There is not a word about docket management, or any other ground not provided by section 1447. Thus, the Thermtron exception does not apply.

Next, Ford and Citibank argue that they do not appeal the propriety of the district court's jurisdictional decision with respect to the underlying cases--which section 1447(d) would prohibit--but rather, they dispute the district court's *power* to render the decision in the first place. They contend that because "[t]he consolidated complaint superseded each of the original complaints, effectively establishing a single lawsuit," dismissal of the consolidated complaint terminated the underlying actions too. Thus, they argue, the district court erred by remanding "non-existent" actions to state court.

[965] Because this argument takes aim at the district court's *authority* to issue the remand order, we have jurisdiction to address the narrow question whether the consolidated federal complaint superseded the underlying state actions in such a way that they were in effect non-existent. *See N. Cal. Dist. Council of Laborers v. Pittsburg-*

Des Moines Steel Co., 69 F.3d 1034, 1038 (9th Cir. 1995) ("[U]nder Thermtron, we have jurisdiction to decide whether a district court has the power to do what it did in issuing a remand order, although we cannot examine whether a particular exercise of power was proper.") (internal quotations omitted).

Ford and Citibank begin their argument with the premise that a consolidated complaint is "akin to an amended complaint," which "supersedes the original, the latter thereafter being treated as non-existent." *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). They thus contend that the consolidated complaint amended the original state complaints, rendering them "non- existent." However, they provide no authority for this proposition. The cases on which they rely merely stand for the unremarkable propositions that: (1) an amended complaint supersedes an original and (2) in a consolidated action, a consolidated complaint is the operative pleading and supersedes all previously filed complaints. No authority supports the contention that a consolidated complaint touches or disturbs underlying state claims.

Nor is there anything cited to us in the record that demonstrates the district court meant for the complaints in the remand cases to disappear. On the contrary, the plaintiffs "consolidate" their efforts into one document which becomes the operative pleading. No court order did anything more than this. Once that umbrella complaint was dismissed, it left the underlying state removed complaints intact. Therefore, the district court did not exceed its authority in remanding the underlying removed actions to state court and, pursuant to section 1447(d), we lack jurisdiction to review its decision.

AFFIRMED IN PART AND DISMISSED IN PART

/s/_____

[Judge Name]